No. 298

No. 299

JOINT APPENDIX

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IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

(Consolidated Appeals)

No. 13,822

ERIC G. KAUFMAN, ET AL., *Appellants*,

v.

HERBERT BROWNELL, JR., *Appellee*.

No. 13,823

ERNEST ATTENHOFER, ET AL., *Appellants*,

v.

HERBERT BROWNELL, JR., *Appellee*.

Appeals from the United States District Court for the District of Columbia

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United States Court of Appeals
For the
District of Columbia Circuit
FILED MAY 8 1957
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IN THE

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v.

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v.

HERBERT BROWNELL, JR., *Appellee.*

Appeals from the United States District Court for the District of Columbia

---

JOINT APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 4360-48

SOCIETÉ INTERNATIONALE POUR PARTICIPATIONS INDUSTRIELLES ET COMMERCIALES, S.A., *ETC., Plaintiff*

v.

J. HOWARD MCGRATH, ET AL., *Defendants*

REMINGTON RAND, INC., *Intervenor*

ERIC G. KAUFMAN and AENNI C. KAUFMAN, indvidually and as general guardians of the persons and property of EMIL GEBT KAUFMAN and RUTH MIRJAM KAUFMAN, and on behalf of all stockholders of the plaintiff similarly situated,

802 West 190th Street
New York 33, New York

Applicants for Intervention

Filed June 5, 1950

Amended Motion for Leave to Intervene

Eric G. Kaufman and Aennie C. Kaufman, hereinafter referred to as "applicants", move for leave to intervene as plaintiffs in this action, on their own behalf and on behalf of all stockholders of the plaintiff similarly situated, on the grounds that (1) applicants have a substantial interest in the subject matter of this action, the representation of their interest by the present parties to this action is inadequate, and applicants will be bound by a judgment in the action, and (2) applicants may be adversely affected by a distribution or other disposition of property subject

to the control or disposition of the Court in this action. In support of this motion applicants represent as follows:

918B 1. Applicants, individually and as general guardians of the persons and property of Emil Gert Kaufman and Ruth Mirjam Kaufman, are and at all times mentioned herein have been the sole and beneficial owners for value, of 86 shares of the capital stock of the plaintiff herein. Applicants are not now, and have not been at any time since December 6, 1941, enemies, enemy nationals, allies of enemies, nationals of allies of enemies, nationals of a designated enemy country, or nationals of Germany or Japan within the meaning of the Trading With the Enemy Act, as amended, and are not now and have not been since December 6, 1941, directly or indirectly controlled by or affiliated with I. G. Farbenindustrie, A.G., or any other enemy of the United States or national of Germany or Japan, all as more fully set forth in the first count of the verified pleading attached hereto.

2. On and prior to February 16, 1942, plaintiff was the owner of approximately 93 per cent of the capital stock of General Aniline & Film Corporation, a Delaware corporation, and certain other property in the United States which stock and property were vested by defendant's predecessors upon the finding that such property was beneficially owned or controlled by I. G. Farbenindustrie, A.G., an enemy of the United States, and defendants now hold the property so vested and other property subsequently received as dividends on the stock of General Aniline & Film Corporation, all as more fully set out in the first count of the verified pleading attached hereto.

3. The present action was brought by plaintiff corporation pursuant to Section 9 (a) of the Trading With the Enemy Act, as amended, and the Fifth Amendment to the Constitution of the United States, to compel a return of the stock of General Aniline & Film Corporation, property distributed to defendant's predecessors as dividends on such stock, and other property of plaintiff so vested.

4. Applicants will be bound by the judgment in this action and will be adversely affected by a distribution or other disposition of property in the custody or subject to the control or disposition of the Court in this action, if such distribution or disposition is made without consideration of applicants' interest therein.

918 C 5. The interests of the applicants are not adequately represented by any of the present parties to this action for the reasons set forth in full in the verified proposed pleading attached hereto.

6. Applicants present this application for intervention and proposed verified complaint attached hereto on behalf of the corporation in a derivative capacity, on their own behalf, and on behalf of all other stockholders of plaintiff similarly situated, in the first and second counts of said pleading, and on their own behalf and on behalf of said stockholders without regard to whether the nature of the claim is derivative, representative or otherwise, in the third count of said pleading. The interests of plaintiff and of such other stockholders are not adequately represented in this action for the reasons set forth in full in said proposed pleading, and will not be unless applicants are permitted to intervene herein.

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(Original Filed July 19, 1952)

Amended Complaint in Intervention by Intervenors as Stockholders of Plaintiff Corporation to Assert a Claim of Plaintiff in a Derivative Capacity and to Prevent an Impending Settlement which is Illegal under the Trading with the Enemy Act.

Intervenors above named, by leave of Court first had and obtained, file this, their complaint in intervention, for themselves and on behalf of all stockholders of plaintiff similarly situated, against the above named defendants, and say:

FIRST COUNT

1. The principal action and the action set forth in this complaint in intervention arise under the Fifth Amendment to the Constitution of the United States and the Trading With the Enemy Act of October 6, 1916, as amended (U.S.C. Title 50, Appendix, Secs. 1-38).

2. Intervenors are residents of the City, County and State of New York and are now and have been at all times since December 6, 1941, non-enemies. The term "enemy" as used in this complaint means enemies, enemy nationals, allies of enemies, nationals of allies of enemies, nationals of a designated enemy country, or nationals of Ger-
920 many or Japan, within the meaning of the Trading With the Enemy Act, as amended, and corporations or other persons directly or indirectly owned or controlled by or affiliated with an "enemy", and the term "non-enemy" means the absence of such status.

3. Plaintiff is a corporation organized under the laws of the Confederation of Switzerland and has its principal office at Basle, Switzerland. Upon information and belief, plaintiff is and always has been a citizen of Switzerland, and has no principal office, place of business, or agent in the United States. Plaintiff is not now and has not been at any time since December 6, 1941, an enemy, at least to the extent that the plaintiff represents non-enemy interests,

that is to say, at least to the extent plaintiff has been, since December 6, 1941, and is now owned by non-enemies.

4. On and prior to February 16, 1942, plaintiff was the owner of approximately 93 per cent of the capital stock of General Aniline & Film Corporation, a Delaware corporation, and of certain other property within the United States. On or about February 16, 1942, April 24, 1942, February 15, 1943, June 24, 1946, June 26, 1946, October 14, 1946 and February 16, 1948, defendants' predecessors issued certain vesting orders seizing the aforesaid property upon the finding that said property was beneficially owned or controlled by I. G. Farbenindustrie, A.G., an enemy of the United States. By reason of Executive Order No. 9788, effective October 15, 1946, predecessors of defendant McGrath received said stock and other property, including a substantial portion of the capital stock of plaintiff paid as dividends on the stock of General Aniline & Film Corporation, and defendants now hold same, as more particularly alleged in the original complaint herein and as admitted in the answer of the defendants herein. The vested stock of General Aniline & Film Corporation has been valued, since the institution of the principal action, by plaintiff as in excess of $100,000,000, and by defendants variously as from $50,000,000 to in excess of $100,000,000.

5. Upon information and belief, plaintiff, within the time limited by law, filed claims with the Alien Property Custodian or predecessors of the defendant McGrath, or both, pursuant to the provisions of the Trading With the Enemy Act and after their denial filed the principal action pursuant to Section 9 (a) of the said Act and within the time limited by law. The theory of the complaint in the principal action is substantially identical with that advanced by the plaintiff in *Uebersee Finanz-Korp.* v. *United States*, 332 U.S. 480, and appears to have been patterned on that complaint. In essence, the complaint in the principal action alleges plaintiff is entitled to the return of all the property therein described because plaintiff at the

time of vesting was a non-enemy entity. Although the complaint was filed October 21, 1948, the principal action is still not at issue. Defendants' amended answer (including counterclaims) was filed January 26, 1950, and plaintiff has not yet answered the counterclaims. While much time has been spent taking depositions, no pre-trial conference has yet been held concerning the issues of the principal action. Upon information and belief, the law of Switzerland would require plaintiff, upon receipt of any recovery or property or money in the principal action, by order of court, settlement or otherwise, to apply such recovery equally for the benefit of all its stockholders, without regard to their status as enemies or non-enemies and without regard to the policy of the United States as expressed in the Trading With the Enemy Act.

6. Intervenors herein allege on behalf of plaintiff that plaintiff is, under the Trading With the Enemy Act, entitled to the return of that portion of the properties in issue herein, or of the proceeds of its sale at full and fair value, which is proportionate to the interests in plaintiff held by non-enemies, without regard to the disposition of any other portion of such properties, or the proceeds of any sale thereof, which defendants herein may be permitted to make under the provisions of the Trading With the Enemy Act or otherwise, such portion of the properties or the proceeds thereof to be returned to plaintiff for all proper corporate purposes, only excluding from the benefits thereof all interests ineligible to participate therein under the Trading With the Enemy Act.

7. Intervenors Kaufman, individually and as general guardians of the persons and property of Emil Gert Kaufman and Ruth Mirjam Kaufman, are, and at all times since December 6, 1941 and prior to the vesting orders referred to in pargraph 4 hereof have been, the sole and beneficial owners for value of eighty-six (86) shares of the
 capital stock of plaintiff having a current market

value of about $15,000 and having a substantially greater value if plaintiff's legal rights as herein stated are recognized. Upon information and belief, the non-enemy stockholders of plaintiff are, and at all times since December 6, 1941 and prior to the vesting orders referred to in paragraph 4 hereof have been, the sole and beneficial owners of not less than one-third of the oustanding stock of plaintiff, putting aside the stock presently in the hands of defendants herein, and formerly held by General Aniline & Film Corporation. The intervenors and other non-enemy stockholders of plaintiff are all eligible under the Trading With the Enemy Act to participate in the benefits of the return to plaintiff of any of the property involved in this proceeding.

8. Plaintiff has not made in the principal action the claim described in paragraph 6 above, and, on information and belief, plaintiff will not assert that or any similar claim in said action. On information and belief it is further alleged that in an effort to avoid the necessity of asserting and pressing such claim, the ultimate determination of which may involve consideration of conflicting interests within plaintiff corporation, plaintiff proposes to settle the principal action on a lump-sum basis without regard to the merits of such claim and the conflicts within the corporation arising therefrom, all as more fully appears from the second count hereof.

9. Plaintiff, the intervenors and other non-enemy stockholders of plaintiff are not adequately represented by the management of plaintiff which controls and is conducting the principal action, because of the conflicting interests within plaintiff and the embarrassment of the present corporate management arising from the question whether it is enemy or non-enemy controlled. More specifically:

(a) It appears of record in the principal action that approximately 10.9 per cent of the shareholders of plaintiff were nationals of Germany, and therefore

enemies, at the time the properties involved were vested. The assertion of the claim set forth in paragraph 6 involves the necessary consideration of excluding enemies from participation in the ultimate benefits of such claim. In view of the conflicting interests
923 within the plaintiff corporation, its management, which has a legal obligation to speak for plaintiff's enemy and non-enemy stockholders alike, is not qualified to raise and present issues which directly or indirectly result in disqualification of some of the stockholders of the corporation from participating in the benefits thereof.

(b) Upon information and belief, approximately 39 per cent of the voting stock of plaintiff was owned at the time the properties involved were vested and is still owned by a group of shareholders hereinafter referred to as the Sturzenegger Group. Upon information and belief, this Group has working control of the corporation and is responsible for the selection of its management. The United States Government, through the Department of Justice, has asserted in this proceeding that plaintiff is a cloak for I. G. Farbenindustrie, the giant German chemical combine, because of I. G. Farbenindustrie's domination of the Sturzenegger Group. It is further asserted of record in the principal action by counsel for defendants that the Sturzenegger Group "owns and is I. G. Chemie"; that "It is our position, furthermore, that the private banking firm of G. Sturzenegger has been the dominant controller of this plaintiff for the purposes of I. G. Farben"; that "Sturzenegger is the leader of a group of corporations known as the Sturzenegger Complex and they own much and they own a predominating share in the plaintiff"; that "Hans Sturzenegger is the eptiome of the plaintiff. He is—and this is our own term, it is our charge that he is the arch conspirator. He is the head of the tainted corporations, which are circular in nature and which

own a large block of stock in the plantinff. He dominates the plaintiff". If the Sturzenegger Group should be held to be enemy or enemy-tainted, the claim referred to in paragraph 6 above would disqualify such Group from participating in the proceeds of the ultimate recovery. Intervenors therefore allege that it is contrary to the interests of the Sturzenegger Group and of the management of plaintiff, to the extent such management represents the Group, to draw any distinction between enemy and non-enemy interests
924 in plaintiff of the nature set forth in paragraph 6 hereof.

(c) Plaintiff, through its counsel in open court, has disparaged and repudiated the basis of any claim as set forth in paragraph 6 hereof, stating that the same was "manufactured" for expediency, and has otherwise indicated that plaintiff does not have any intention of pressing such claim and, on the basis of statements in the record here, appears determined to press a claim based solely on a complaint which under substantially similar circumstances the Supreme Court of the United States has construed to mean that "the property is free of all enemy taint and particularly that the corporations whose shares have been seized, the corporations which have a contract in which respondent has an interest, and respondent itself are companies in which no enemy, ally of an enemy, nor any national of either has an interest of any kind whatsoever, and that respondent has not done business in the territory of the enemy or any ally of an enemy", notwithstanding the fact that, even if the Sturzenegger Group is free of enemy taint, it is clear from the record in the principal action that approximately 10.9 per cent of the plaintiff's stockholders were German nationals and therefore enemies at the time the properties involved were vested.

Intervenors and all other non-enemy stockholders of plaintiff are, will, or may be bound by the judgment in the principal action.

10. Intervenors are so situated as to be adversely affected by a distribution or other dispostion of the properties involved in the principal action, which properties are subject to the control or dispostion of this Court.

11. Intervenors assert the claim contained in this first count on behalf of plaintiff in a derivative capacity, and on behalf of all non-enemy stockholders of plaintiff eligible under the Trading With the Enemy Act to participate in the benefits of the return to plaintiff of any of the properties involved in this proceeding.

925 12. The persons constituting the class of plaintiff's non-enemy stockholders eligible under the Trading With the Enemy Act to participate in the benefits of the return to plaintiff of any of the properties involved in this proceeding are so numerous as to make it impracticable to bring them all before this Court and the character of the right sought to be enforced for said class is common to all such persons.

13. Intervenors herein are now and were, at the time of the transaction of which they complain, shareholders of plaintff. This claim in intervention is not a collusive one to confer on a court of the United States jurisdiction of any action of which it would not otherwise have jurisdiction. The reasons intervenors have made no effort to secure from the managing directors or trustees of plaintiff such action as they desire are that such effort would be wholly futile and unavailing because the managing directors or trustees of plaintiff control and are conducting the principal action, because of the conflicting interests within the plaintiff, and because of the embarrassment of the managing directors or trustees of plaintiff arising from the question whether such managing directors or trustees are enemy or non-enemy controlled. More specifically:

(a) It appears of record in the principal action that approximately 10.9 per cent of the shareholders of plaintiff were nationals of Germany, and therefore enemies, at the time the properties involved were vested. The assertion of the claim set forth in paragraph 6 involves the necessary consideration of excluding enemies from participation in the ultimate benefits of such claim. In view of the conflicting interests within plaintiff corporation, its managing directors or trustees, which have a legal obligation to speak for plaintiff's enemy and non-enemy stockholders alike, are not qualified to raise and present issues which directly or indirectly result in disqualification of some of the stockholders of the corporation from participating in the benefits thereof.

(b) Upon information and belief, approximately 39 per cent of the voting stock of the plaintiff was owned at the time the properties involved were vested and is still owned by a group of shareholders hereinafter referred to as the Sturzenegger Group. Upon information and belief, this Group has working control
926 of the corporation and is responsible for the selection of its management. The United States Government, through the Department of Justice, has asserted in this proceeding that plaintiff is a cloak for I. G. Farbenindustrie, the giant German chemical combine, because of I. G. Farbenindustrie's domination of the Sturzenegger Group. It is further asserted of record in the principal action by counsel for defendants that the Sturzenegger Group "owns and is I. G. Chemie"; that "It is our position, furthermore, that the private banking firm of G. Sturzenegger has been the dominant controller of this plaintiff for the purposes of I. G. Farben"; that "Sturzenegger is the leader of a group of corporations known as the Sturzenegger Complex and they own much and they own a predominating share in the plantiff"; that "Hans

Sturzenegger is the epitome of the plaintiff. He is—and this is our own term, it is our charge that he is the arch conspirator. He is the head of the tainted corporations, which are circular in nature and which own a large block of stock in the plaintiff. He dominates the plaintiff". If the Sturzenegger Group should be held to be enemy or enemy-tainted, the claim referred to in paragraph 6 above would disqualify such Group from participating in the proceeds of the ultimate recovery. Intervenors therefore allege that it is contrary to the interests of the Sturzenegger Group and of the managing directors or trustees of plaintiff, to the extent such managing directors or trustees represent the Group, to draw any distinction between enemy and non-enemy interests in plaintiff of the nature set forth in paragraph 6 hereof.

(c) Plaintiff, through its counsel in open court, has disparaged and repudiated the basis of any claim as set forth in paragraph 6 hereof, stating that the same was "manufactured" for expediency, and has otherwise indicated that the managing directors or trustees of plaintiff do not have any intention of pressing such claim and, on the basis of statements in the record here, appear determined to press a claim based solely on a complaint which under substantially similar circumstances the Supreme Court of the United States has construed to mean that "the property is free of all enemy taint and particularly that the corporations whose shares have been seized, the corporations which have a contract in which respondent has an interest, and respondent itself, are companies in which no enemy, ally of an enemy, nor any national of either has an interest of any kind whatsoever, and that respondent has not done business in the territory of the enemy or any ally of an enemy", notwithstanding the fact that, even if the Sturzenegger Group is free of enemy taint, it is clear from the record

in the principal action that approximately 10.9 per cent of plaintiff's stockholders were German nationals, and therefore enemies, at the time the properties involved were vested.

(d) As hereinafter more specifically shown in the second count, plaintiff and defendants have been negotiating for a settlement of the principal action since October, 1949, the fact of such negotiations appearing of record in the principal action for the first time in the latter part of 1949. Upon information and belief, plaintiff and defendants intend to conclude a settlement of the principal action at an early date and accordingly, since plaintiff corporation is a Swiss corporation, not otherwise amenable to the jurisdiction of the courts of the United States, the assertion of the claim urged in paragraph 6 of the first count may be completely destroyed by settlement of the principal action prior to the time your intervenors could comply with the necessary formalities of seeking to secure from the managing directors or trustees of plaintiff corporation such action as they desire, and obtaining a refusal thereof by such managing directors or trustees.

(e) The action these intervenors desire the plaintiff corporation to take to enforce rights which may properly be asserted by it is completely within the control of the managing directors or trustees of the corporation and action by the shareholders of plaintiff is unnecessary to authorize the managing directors
928 or trustees to take such action. In any case, any request for such action by the stockholders would, on information and belief, be wholly futile and unavailing because the Sturzenegger Group has working control of the stock of the plaintiff.

14. There is no effective remedy adequate to protect intervenors and other non-enemy stockholders of plaintiff similarly situated except intervention herein. Unless in-

tervention is granted intervenors and other non-enemy stockholders of plaintiff similarly situated will be irreparably injured.

SECOND COUNT

1. Intervenors for their second count herein make all of paragraphs 1, 2, 3, 4, 5, 6 and 7 of their first count, by reference, a part of this second count as completely as though such paragraphs were set out at length herein.

2. During the latter portion of 1949, plaintiff and defendants actively sought to effect a negotiated settlement of the principal action. A principal obstacle to effecting any such settlement was the pendency of the claim of the intervenor, Remington Rand, Inc., which claimed an option to purchase from plaintiff a portion of the vested property for the sum of approximately $25,000,000. The fact of such negotiations for settlement first appeared on the record of the principal action when, late in 1949 and during the progress of such negotiations, defendants, supported by plaintiff, moved this Court for an order adjudging that defendants and plaintiff are entitled to settle the principal action regardless of any right to the contrary asserted by the intervenor, Remington Rand, Inc. This Court denied that motion, and an appeal is now pending thereon to the Court of Appeals for the District of Columbia. Upon information and belief, plaintiff and defendants propose to settle the main action at an early date.

3. Upon a trial of the issues involved in Remington Rand, Inc.'s complaint in intervention, a judgment adverse to that intervenor was entered on April 26, 1950. Remington Rand, Inc. has as yet taken no appeal from that adverse judgment. Accordingly, that intervention at this time poses no obstacle to the settlement of the principal action by plaintiff and defendants.

4. Upon information and belief, the settlement contemplates payment by defendants to plaintiff of an amount far

below the full and fair value of the property involved
929 in the principal action and far below the full and fair value of plaintiff's claims in that action because the negotiations for settlement do not take into account the claim described in paragraph 6 of the first count hereof. Moreover, such settlement is contrary to the purpose and intent of the Trading With the Enemy Act in that, upon information and belief, it fails to impose upon plaintiff the duty and obligation of allocating the benefits of such settlement first to its non-enemy shareholders, to the extent of their full interest in plaintiff. Consequently, and contrary to the Trading With the Enemy Act, the proposed settlement will permit enemy shareholders of plaintiff to benefit therein at the expense of non-enemy shareholders, both allied and neutral, notwithstanding the fact that enemy stockholders are ineligible to benefit from the recovery of assets vested by the United States in an action filed under Section 9 (a) of the Trading With the Enemy Act.

5. Any such settlement as is set out in pargraph 4 of this count would be in violation of the Trading With the Enemy Act which, with certain exceptions immaterial here, makes it unlawful for enemies to benefit by the return of property previously vested by the United States under that Act. This Court sitting in Equity has a duty and responsibility under Section 9 (a) of the Trading With the Enemy Act to supervise and control the ultimate disposition of property recovered from the United States, either by way of settlement or of final judgment in any action instituted under Section 9 (a) to make certain that benefits of the property returned are limited to those who are eligible under the Trading With the Enemy Act to receive such benefits. By attempting to effect a cash settlement of plaintiff's claim, as set out in paragraph 4 of this count, on a basis which would permit the immediate transfer of the cash proceeds of such settlement beyond the territorial jurisdiction of United States courts, plaintiff and defend-

ants would deprive this court of its power to supervise and control the ultimate disposition of the proceeds of the settlement in such a manner as will preclude the receipt of benefits therefrom by enemy shareholders of plaintiff at the expense of the neutral and allied non-enemy shareholders.

6. The withdrawal of the proceeds of any settlement beyond the territorial jurisdiction of the United States courts would compel intervenors and all other non-enemy
930 stockholders of plaintiff similarly situated to resort to the courts of Switzerland for relief. The Swiss Compensation Office, an agency of the Swiss Government, has heretofore determined that plaintiff and the Sturzenegger Group are free of enemy taint. For this reason and for the reason that a Swiss court is not the proper institution to effectuate the war and foreign policies of the United States Government, an appeal to a Swiss court to enforce the provisions of the Trading With the Enemy Act and to allocate the benefits of a settlement between plaintiff and defendants to deprive enemy stockholders of the benefits therefrom at the expense of neutral and allied non-enemy stockholders will be, upon information and belief, futile and ineffectual, resulting in a stultification of the purposes and policies of the Trading With the Enemy Act and indeed a perversion of such purposes and policies by permitting enemies to benefit at the expense of non-enemies. Accordingly, the intervenors and other non-enemy shareholders of plaintiff have no adequate remedy except by intervention herein to prevent a settlement between plaintiff and defendants which is illegal under the Trading With the Enemy Act.

7. Plaintiff, the intervenors, and other non-enemy stockholders are not adequately represented by the management of plaintiff which controls and is conducting the principal action and the settlement being negotiated therein, because of the conflicting interests within plaintiff and the embarrassment of the present corporate management arising

from the question whether it is enemy or non-enemy controlled. More specifically:

(a) It appears of record in the principal action that approximately 10.9 per cent of the shareholders of the plaintiff were nationals of Germany, and therefore enemies, at the time the properties involved were vested. For the reasons set out in paragraph 4 of this count, the proposed settlement involves the necessary consideration of excluding enemies from participaton in the ultimate benefits of such a settlement. In view of the conflicting interests within plaintiff corporation, its management, which has a legal obligation to speak for plaintiff's enemy and non-enemy stockholders alike, is not qualified to negotiate a settlement which di-
931 rectly or indirectly results in disqualification of some of the stockholders of the corporation from participating in the benefits thereof.

(b) Upon information and belief, approximately 39 percent of the voting stock of plaintiff was owned at the time the properties involved were vested and is still owned by a group of shareholders hereinafter referred to as the Sturzenegger Group. Upon information and belief, this Group has working control of the corporation and is responsible for the selection of its management. The United States Government, through the Department of Justice, has asserted in this proceeding that plaintiff is a cloak for I. G. Farbenindustrie, the giant German chemical combine, because of I. G. Farbenindustrie's domination of the Sturzenegger Group. It is further asserted of record in the principal action by counsel for defendants that the Sturzenegger Group "owns and is I. G. Chemie"; that "It is our position, furthermore, that the private banking firm of G. Sturzenegger has been the dominant controller of this plaintiff for the purposes of I. G. Farben"; that "Sturzenegger is the leader of a group of corporations known as the

Sturzenegger Compex and they own much and they own a predominating share in the plaintiff"; that "Hans Sturzenegger is the epitome of the plaintiff. He is—and this is our own term, it is our charge that he is the arch conspirator. He is the head of the tainted corporations, which are circular in nature and which own a large block of stock in the plaintiff. He dominates the plaintiff". Intervenors therefore allege that since it is the possible enemy status or enemy-taint of the Sturzenegger Group which in largest measure impels plaintiff corporation to effect a compromise of its claim, it is contrary to the interests of the Sturzenegger Group and the management of plaintiff corporation, to the extent such management represents the Group, to draw any distinction between enemy and non-enemy interests in plaintiff of the nature set forth in paragraph 6 of the first count hereof for the purpose of the settlement.

932 (c) Plaintiff, through its counsel in open court, has disparaged and repudiated the basis of any claim as set forth in paragraph 6 of the first count hereof, stating that the same was "manufactured" for expediency, and has otherwise indicated that the management of plaintiff does not have any intention of pressing such claim and, on the basis of statements in the record here, appears determined to press a claim based solely on a complaint which under substantially similar circumstances the Supreme Court of the United States has construed to mean that "the property is free of all enemy taint and particularly that the corporations whose shares have been seized, the corporations which have a contract in which respondent has an interest, and respondent itself, are companies in which no enemy, ally of an enemy, nor any national of either has an interest of any kind whatsoever, and that respondent has not done business in the territory of the enemy or any ally of an enemy",

notwithstanding the fact that, even if the Sturzenegger Group is free of enemy taint, it is clear from the record that approximately 10.9 per cent of the plaintiff's stockholders were German nationals, and therefore enemies, at the time the properties involved were vested.

(d) The management of plaintiff which controls and is conducting the principal action and which is negotiating the proposed settlement which is illegal under the Trading With the Enemy Act proposes, upon information and belief, to remove the proceeds of such settlement to Switzerland, beyond the jurisdiction of this Court.

Intervenors and all other non-enemy stockholders of plaintiff corporation are, will, or may be bound by the judgment in the principal action.

8. Intervenors are so situated as to be adversely affected by a distribution or other disposition of the properties involved in the principal action, which properties are subject to the control or disposition of this Court, or by a distribution of the proceeds of such a settlement as described in this count, without supervision of this Court.

933 9. Intervenors assert the claim contained in this second count on behalf of plaintiff in a derivative capacity, and on behalf of all non-enemy stockholders of plaintiff eligible under the Trading With the Enemy Act to participate in the benefits of the return to plaintiff of any of the properties involved in this proceeding.

10. The persons constituting the class of non-enemy stockholders of plaintiff eligible under the Trading With the Enemy Act to participate in the benefits of the return to plaintiff of any of the properties involved in this proceeding are so numerous as to make it impracticable to bring them all before this Court and the character of the right sought to be enforced for said class is common to all such persons.

11. Intervenors herein are now and were, at the time of the transaction of which they complain, shareholders of plaintiff. This claim in intervention is not a collusive one to confer on a court of the United States jurisdiction of any action of which it would not otherwise have jurisdiction. The reasons intervenors have made no effort to secure from the managing directors or trustees of plaintiff such action as they desire are that such effort would be wholly futile and unavailing because the managing directors or trustees of plaintiff control and are conducting the principal action, because of the conflicting interests within the plaintiff, and because of the embarassment of the managing directors or trustees of plaintiff arising from the question whether such managing directors or trustees are enemy or non-enemy controlled. More specifically:

(a) It appears of record in the principal action that approximately 10.9 per cent of the shareholders of plaintiff were nationals of Germany, and therefore enemies, at the time the properties involved were vested. For the reasons set forth in paragraph 4 of this count, the proposed settlement involves the necessary consideration of excluding enemies from participation in the ultimate benefit of such a settlement. In view of the conflicting interests within plaintiff corporation, its managing directors or trustees, which have a
934 legal obligation to speak for plaintiff's enemy and non-enemy stockholders alike, are not qualified to negotiate a settlement which directly or indirectly results in disqualification of some of the stockholders of the corporation from participating in the benefits thereof.

(b) Upon information and belief, approximately 39 per cent of the voting stock of plaintiff was owned at the time the properties involved were vested and is still owned by a group of shareholders hereinafter referred to as the Sturzenegger Group. Upon information and

belief, this Group has working control of the corporation and is responsible for the selection of its management. The United States Government, through the Department of Justice, has asserted in this proceeding that plaintiff is a cloak for I. G. Farbenindustrie, the giant German chemical combine, because of I. G. Farbenindustrie's domination of the Sturzenegger Group. It is further asserted of record in the principal action by counsel for defendants that the Sturzenegger Group "owns and is I. G. Chemie"; that "It is our position, furthermore, that the private banking firm of G. Sturzenegger has been the dominant controller of this plaintiff for the purposes of I.G. Farben"; that "Sturzenegger is the leader of a group of corporations known as the Sturzenegger Complex and they own much and they own a predominating share in the plaintiff"; that "Hans Sturzenegger is the epitome of the plaintiff. He is—and this is our own term, it is our charge that that he is the arch conspirator. He is the head of the tainted corporations, which are circular in nature and which own a large block of stock in the plaintiff. He dominates the plaintiff". Intervenors therefore allege that since it is the possible enemy status or enemy-taint of the Sturzenegger Group which in largest measure impels plaintiff corporation to effect a compromise of its claim, it is contrary to the interests of the Sturzenegger Group and of the managing directors or trustees of plaintiff, to the extent such managing directors or trustees represent the Group,

935 to draw any distinction between enemy and non-enemy interests in plaintiff of the nature set forth in paragraph 6 of the first count here of for the purpose of the settlement.

(c) Plaintiff, through its counsel in open court, has disparaged and repudiated the basis of any claim as set forth in paragraph 6 of the first count hereof, stat-

ing that the same was "manufactured" for expediency, and has otherwise indicated that the managing directors or trustees of plaintiff do not have any intention of pressing such claim and, on the basis of statements in the record here, appear determined to press a claim based solely on a complaint which under substantially similar circumstances the Supreme Court of the United States has construed to mean that "the property is free of all enemy taint and particularly that the corporations whose shares have been seized, the corporations which have a contract in which respondent has an interest, and respondent itself, are companies in which no enemy, ally of an enemy, nor any national of either has an interest of any kind whatsoever, and that respondent has not done business in the territory of the enemy or any ally of an enemy", notwithstanding the fact that, even if the Sturzenegger Group is free of enemy taint, it is clear from the record that approximately 10.9 per cent of the plaintiff's stockholders were German nationals, and therefore enemies, at the time the properties involved were vested.

(d) As in this count shown, plaintiff and defendants have been negotiating for a settlement of the principal action since October 1949, the fact of such negotiations appearing of record in the principal action for the first time in the latter part of 1949. Upon information and belief, plaintiff and defendants intend to conclude a settlement of the principal action at an early date, and accordingly, since plaintiff is a Swiss corporation not otherwise amenable to the jurisdiction of the courts of the United States, the assertion of the claim urged in paragraph 6 of the first count may be completely destroyed by settlement of the principal action prior to the time your intervenors could comply with the
936 necessary formalities of seeking to secure from the managing directors or trustees of plaintiff

corporation such action as they desire, and obtaining a refusal thereof by such managing directors or trustees.

(e) The action these intervenors desire the plaintiff corporation to take to enforce rights which may properly be asserted by it is completely within the control of the managing directors or trustees of the corporation and action by the shareholders of plaintiff is unnecessary to authorize the managing directors or trustees to take such action. In any case, any request for such action by the stockholders would, on information and belief, be wholly futile and unavailing because the Sturzenegger Group has working control of the stock of the plaintiff.

THIRD COUNT

1. Intervenors for their third count herein make all of paragraphs 1, 2, 3, 4, 5, 6 and 7 of their first count and paragraphs 2, 3, 4, 5 and 6 of their second count, by reference, a part of this third count as completely as though such paragraphs were set out at length herein.

2. Intervenors and other non-enemy stockholders similarly situated are not adequately represented by the management of plaintiff which controls and is conducting the principal action and the settlement being negotiated therein, because that management is negotiating a settlement which is illegal under the Trading With the Enemy Act and upon information and belief proposes to remove the proceeds of such settlement to Switzerland, beyond the jurisdiction of this Court. Intervenors and all other non-enemy stockholders of plaintiff are, will, or may be bound by the judgment in or settlement of the principal action.

3. Intervenors are so situated as to be adversely affected by a distribution or other disposition of the properties involved in the principal action, which properties are subject to the control or disposition of this Court, or by a distribution of the proceeds of such a settlement as described in this count, without supervision of this Court.

4. Intervenors assert the claim contained in this third count, on behalf of themselves and other non-enemy shareholders of plaintiff similarly situated, without regard to whether it may be categorized as representative, derivative, or otherwise.

937 5. The persons constituting the class of non-enemy stockholders of plaintiff eligible under the Trading With the Enemy Act to participate in the benefits of the return to plaintiff of any of the properties involved in this proceeding are so numerous as to make it impracticable to bring them all before this Court and the character of the right sought to be enforced for said class is common to all such persons.

WHEREFORE, these intervenors demand:

1. That this Court adjudicate and determine the rights of plaintiff to be as set forth in paragraph 6 of the first count of this complaint in intervention.

2. That this Court restrain and enjoin plaintiff and defendants from making any settlement of the principal action unless and until adequate provision is made for adjudication and determination by this Court of the claim as set forth in said paragraph 6.

3. That this Court order and direct plaintiff and defendants to pay the amount of any settlement which may be made into the registry of this Court pending presentation of a plan by the parties hereto whereby the amount of such settlement shall be applied first to the benefit of plaintiff's non-enemy shareholders, to the extent of their full interest in plaintiff, and pending ultimate determination as to the rights of those eligible to participate in the proceeds under the Trading With the Enemy Act.

4. That this Court retain control over all the properties involved or the proceeds of the sale thereof until plaintiff has given adequate assurance or security that such properties or proceeds will be handled by the corporation in strict

accordance with the provisions of the Trading With the Enemy Act and such orders or directions as the Court may issue to enforce that enactment.

938 5. Such other and further relief as this Court may deem proper.

WILLIAM RADNER
Tower Building
Washington 5, D. C.

ODELL KOMINERS
Tower Building
Washington 5, D. C.

HENRY G. FISCHER
Dupont Circle Building
Washington 6, D. C.
Attorneys for Intervenors

GRAUBARD AND MOSKOVITZ
115 Broadway
New York 6, New York
Of counsel

939 State of New York
County of New York, ss.:

AENNI C. KAUFMAN, being duly sworn, deposes and says that she resides at 802 West 190th Street, New York 33, New York, and that she is one of the intervenors in the foregoing complaint and knows the contents thereof and that the same are true of her own knowledge except as to the matters therein stated to be alleged on information and belief, and as to those matters she believes them to be true.

AENNI C. KAUFMAN

Subscribed and sworn to before me, a Notary Public in and for the State and County of New York this 3rd day of June, 1950.

JESSE F. TOMPKINS,
Notary Public

992 Filed June 16, 1952

Motion for Leave to Intervene

Ernest Attenhofer, hereinafter referred to as "Applicant," moves this Honorable Court for leave to intervene as plaintiff in the above-captioned action and to file a Complaint in Intervention, a verified copy of which is attached, on his own behalf and on behalf of all other non-enemy shareholders of the plaintiff domiciled in Switzerland and other European countries, and on behalf of all other non-enemy shareholders who may wish to join, against the defendants, on the grounds (1) that the representation of the Applicant's interest by the parties is or may be inadequate and the Aplicant is or may be bound by the judgment in the principal action, (2) that Applicant's claim and the principal action have questions of law or fact in common, and/or (3) that the object of the action is the adjudication of claims which will or may affect specific property involved in the action which is subject to the control and disposition of the Court, all as fully set forth in the aforesaid
993 complaint and in the affidavit of Dr. Hans Pestalozzi attached hereto and made a part hereof.

Respectfully submitted,

HOGAN & HARTSON

By EDMUND L. JONES
PAUL R. CONNOLLY, JR.
C. FRANK REIFSNYDER
Attorneys for Movant,
810 Colorado Building
Washington 5, D. C.

DR. HANS PESTALOZZI,
Bahnhofstrasse 31,
City of Zurich,
Canton of Zurich,
Of Counsel.

Affidavit

CONFEDERATION OF SWITZERLAND, CANTON OF BASELSTATT AND CITY OF BASEL, CONSULATE GENERAL OF THE UNITED STATES OF AMERICA, ss:

Dr. Hans Pestalozzi, being duly sworn, deposes and says:

1. I am a lawyer duly authorized to practice law and have offices at Bahnhofstrasse 31, City of Zurich, Canton of Zurich. On behalf of Ernest Attenhofer and 554 non-enemy shareholders holding 24411 shares of stock in plaintiff corporation and all other non-enemy shareholders of the plaintiff domiciled in Switzerland or other European countries, and all other non-enemy shareholders who may request that I represent them, I make this affidavit in support of a motion to intervene in the above-captioned action and to file therein a complaint in intervention on the grounds hereinafter more fully set forth and alleged in the proposed complaint, a copy of which is attached to said motion.

2. Plaintiff, commonly called "Interhandel," is a corporation organized under the laws of the Confederation of Switzerland, has its principal office at Basle, Switzerland, and is and always has been a citizen of Switzerland.

3. On and prior to February 16, 1942, and continuously thereafter, plaintiff was and is the owner of 2,050,000 shares of Common B stock and 455,624 shares of Common A stock of General Aniline & Film Corporation, of a value in excess of ONE HUNDRED MILLION DOLLARS ($100,000,000) and of certain other property within the United States, all as more particularly alleged in the plaintiff's complaint filed herein. On or about February 16, 1942, April 24, 1942, February 15, 1943, June 24, 1946, June 26, 1946, October 14, 1946, and February 16, 1948, defendants' predecessors issued certain vesting orders seizing the aforesaid property under the provisions of the Trading with the Enemy Act. The defendants.

still retain the aforesaid stock and other property without warrant of law.

4. By reason of Executive Order No. 9788, effective October 15, 1946, the predecessors of defendants received said stock and other property, including a substantial portion of the capital stock of the plaintiff paid as dividends on the stock of General Aniline & Film Corporation, and defendants now hold all of said property, as more particularly alleged in the plaintiff's complaint herein and as admitted in the answer of the defendants herein.

5. Plaintiff duly filed claims with defendants or their predecessors, pursuant to the provisions of the Trading with the Enemy Act, for the recovery of all of said property on the ground that said seizure was illegal under the Act in that the plaintiff was not an enemy, enemy national, ally of an enemy, national of an ally of an enemy, national of any designated enemy country or a national of Germany or Japan, or in any other sense an enemy within
1001 the meaning of the Trading with the Enemy Act, as amended, and, after the denial of said claims, filed the principal action pursuant to Section 9(a) of said Act for the return to it of said seized properties on the grounds above stated.

6. The defendants in said action interposed as a defense to the recovery of said properties the claim that the plaintiff was an enemy within the meaning of the Trading with the Enemy Act, and this issue in said action is now pending before this Court.

7. On April 7, 1952 the Supreme Court of the United States in the case of Eric G. Kaufman and Aenni C. Kaufman, petitioners, against Societe Internationale, etc., October Term, 1951, No. 172, held that non-enemy shareholders of the plaintiff should be allowed to intervene in the principal action. The order of this Court on the mandate from the Supreme Court of the United States was entered May 20, 1952.

8. The aforesaid *Kaufman* case further held that "when the Government seizes assets of a corporation organized under the laws of a neutral country, the rights of innocent stockholders to an interest in the assets proportionate to their stock holdings must be fully protected." It was further held that the appropriate procedure for the recognition of this interest in the assets is by intervention in the principal corporate action.

9. Promptly following the date of this decision, the members of the Board of the plaintiff, in the discharge of their fiduciary duties to all shareholders, determined that the protection of the interests of each of said shareholders, in the event that the corporate plaintiff should be unsuccessful in the recovery of the seized property, required the intervention of all shareholders who were in a position to establish their separate non-enemy status within the meaning of the decision in said *Kaufman* case, and that such shareholders should be represented by counsel independent from those representing the company in the principal action.

10. In May, 1952, the Administration of the plaintiff addressed to all of its shareholders a communication, 1002 copy of which in the original German is annexed hereto and marked "Exhibit A1", with an accurate translation thereof annexed hereto and marked "Exhibit A2," in which it was stated that individual shareholders of the company might intervene in the court proceedings in order to assert directly their proportional part-claims upon the defendants in the event that the claim of the plaintiff should be dismissed. It was stated that The Administration of the corporation would continue its fight for recognition that the company, as such, was non-enemy and was, therefore, entitled to a return of its property and would take every step to attain that end. It was further stated that since the decision of the Supreme Court permitted the assertion of the contingent claims of individual shareholders, The Administration considered it to be its duty to have organized the representation of these contingent claims for all

shareholders wishing to make use of this possibility, and it was further stated that I was prepared to represent any shareholders wishing to be represented in this matter.

11. That in connection with said communication of May, 1952 from the management of the corporation, a committee has been formed to cooperate with affiant in all important problems relative to the representation of shareholders of the plaintiff corporation in the instant intervention. The members of such committee are Messrs. Adrien Lachenal of Geneva, Robert Buehler of Winterthur and Professor Hans Fritzsche of Zurich.

12. In response to the aforesaid communication, 555 shareholders, holding 24411 shares in plaintiff corporation and being domiciled in Switzerland and other European countries and elsewhere have authorized me to act on their behalf in this matter. The Applicant, Ernest Attenhofer, is in this group, is domiciled in Switzerland, residing at Fringelistr. 14, Basle, and now is and since prior to February 16, 1942, has been the owner in his own right of fifteen shares of the capital stock of plaintiff corporation. The Applicant is a native Swiss citizen and has been residing in Switzerland continuously since 1913.

13. I am informed and believe that the Applicant
1003 and each of the other shareholders who has authorized me to act on his behalf is a non-enemy shareholder in plaintiff corporation within the meaning of the decision in the *Kaufman* case and within the applicable provisions of the Trading with the Enemy Act and as such is entitled to recover an interest in the assets seized by the United States proportionate to his stockholdings in the plaintiff corporation in the event that the plaintiff corporation is unsuccessful in the principal action.

14. The interests of this intervenor and the other above described non-enemy shareholders similarly situated are not or may not be adequately represented by either the plaintiff or the intervenors Kaufman; and this intervenor

and other above described non-enemy shareholders similarly situated will or may be bound by the judgment in the principal action. The complaint in intervention filed by Eric G. Kaufman and Aenni C. Kaufman reveals, on its face, hostility to certain of the principal shareholders of the corporate plaintiff who have authorized or may authorize me to act on their behalf. Moreover, as appears from the petition of said Eric G. Kaufman and Aenni C. Kaufman, the shareholders represented in such intervention are American citizens, resident in the City of New York and owners of only 86 shares of stock, and are differently situated than are the applicant and the shareholders on whose behalf this application is made, who are all nationals of Switzerland, the Netherlands, France and other European and other countries owning in the aggregate 2,411 shares of stock, being approximately 11.8 per cent of the issued and outstanding shares of the plaintiff corporation (fully paid common shares).

15. Your affiant has read a copy of the proposed complaint in intervention attached to the motion which this affidavit supports, and verily believes the allegations therein contained to be true.

SWISS CONFEDERATION, CANTON AND CITY OF BASEL, CONSULATE OF THE UNITED STATES OF AMERICA, ss:

/s/ DR. HANS PESTALOZZI
Dr. Hans Pestalozzi

Subscribed and sworn to before me this 13th day of June, 1952.

/s/ RUDOLPH W. HEFTI
Vice Consul of the United States of America, Basel, Switzerland

(SEAL) AMERICAN CONSULATE
BASEL, SWITZERLAND
Jun 13 1952
Notarial Service No. 2084
Fee $2 — Frs. 8.80

CITY OF ZURICH
CANTON OF ZURICH
FEDERATION OF SWITZERLAND

Hans Gut, being duly sworn, deposes and says:

I am Director of Schoop, Reiff & Co., Aktiengesellschaft, a Swiss banking corporation with offices at Pelikanstrasse 6, Zurich. I make this affidavit not only on my own behalf as a stockholder of the plaintiff corporation, known as Interhandel, but on behalf of Schoop, Reiff & Co., as Protective Committee for the bona fide non-enemy ordinary shares of Interhandel.

My company, Schoop, Reiff & Co. was constituted as such Protective Committee for the non-enemy shareholders of Interhandel in May 1950, and has continually and affirmatively acted, and still does, in that capacity since then. At that time, May 1950, we published appeals to the shareholders in several leading newspapers in Switzerland, and invited interested shareholders to authorize us to act as such Protective Committee. In June 1950, we had received executed forms of authorization from 94 shareholders owning over 11,000 shares of Interhandel, empowering my company, Schoop, Reiff & Co. to act as Protective Committee for them.

At the present time Schoop, Reiff & Co. is authorized to act as Protective Committee for 190 non-enemy shareholders of Interhandel, owning 17,268 ordinary shares of Interhandel. Each of the shareholders has contributed a small sum per share to defray the costs of the protective action which we have undertaken, and we have thus acted independently of the plaintiff corporation and its management, and we are therefore beholden to no one except the non-enemy shareholders of Interhandel.

1060 Both prior to and subsequent to the establishment of the Protective Committee, Schoop, Reiff & Co. had attempted several times by correspondence, and by appeals

at annual shareholders' meetings, to the management, to seek to obtain information and to cooperate with the corporation for the best interests of the non-enemy shareholders, but was always rebuffed. The corporation and its management showed no desire or inclination to accept our offer of cooperation or to assert any claim based upon the non-enemy interests, which would serve as a protection in the event that the corporation should happen to lose the main claim for the return of all of its vested property. On the contrary, the plaintiff's management showed displeasure with our efforts in behalf of the non-enemy shareholders, repudiated any claim which could be made for the benefit of the non-enemy shareholders, and even went so far, through its attorneys, as to call it "legal suicide." Schoop, Reiff & Co., on the other hand, has at all times accepted the plaintiff's position that it is non-enemy and has continuously and publicly stated it hopes and believes that the plaintiff corporation will succeed in establishing its non-enemy character. Schoop, Reiff & Co. also notes that the Kaufman complaint in intervention makes a similar statement.

Schoop, Reiff & Co., in the best interest of all non-enemy shareholders, and in view of the above, decided to and did actively support the motion for intervention made by the Kaufmans and their proposed amended complaint. To that end, on June 9, 1950, I executed an affidavit on behalf of Schoop, Reiff & Co., as Protective Committee,
1061 which affidavit was filed in this proceeding in support of the motion for leave to intervene made by the Kaufmans in a derivative capacity, on behalf of themselves and all other non-enemy ordinary shareholders of Interhandel similarly situated, in order to assert a claim which the corporation would not and had not made up to that time, even in the alternative. This affidavit of June 9, 1950, was incorporated in the record on appeal (pages 69 *et seq.*) presented to the Supreme Court, and was therefore part of the record on the basis of which the Supreme Court decision of April 7, 1952, was made.

We have accepted and recognized the complaint in intervention as pleading the claim for our shareholders as well, since it was made on behalf of all the non-enemy shareholders of Interhandel, regardless of nationality. We are deeply gratified, for ourselves and for all the non-enemy shareholders, that the Supreme Court of the United States has accepted the Kaufman complaint as being for the benefit of all the Swiss and other non-enemy shareholders, and as therefore including our claim for protection. We understand that this is especially so since the complaint presents a derivative claim, which we understand to mean a single claim in the name of the corporation for "a corporate recovery," as the Supreme Court has said, for the benefit of all the non-enemy shareholders. We accept this claim as adequately protecting the non-enemy shareholders in the possible event that the corporation might be unsuccessful in establishing its main claim that it is non-enemy and entitled to a return of all the vested property.

On or about May 3, 1952, almost four weeks after the Supreme Court decision of April 7th, the first pronouncement by the plaintiff corporation concerning this de-
1062 cision was the advertisement which appeared on May 3, 1952, in several Swiss newspapers. That advertisement, referring to the Supreme Court decision, announced that the corporation conceived it as its duty to organize the representation of the claims of the shareholders, and designated Dr. Hans Pestalozzi, who had declared his willingness to gather together the shareholders who desired to follow the course of action proposed by the management. This advertisement was also circularized, and in the attachment to the circular it was made clear that the shareholders would not have to pay for the costs or services of Dr. Pestalozzi.

Schoop, Reiff & Co. issued its first circular on May 5, 1952, and made two subsequent advertisements on May 12th and on June 6th. There is attached hereto the full text of these circulars, together with accurate translations.

We have been advised by our attorneys that the committee organized under the guidance and instigation of the plaintiff corporation, in the person of Dr. Hans Pestalozzi, has applied to the Court for leave to intervene and to file its own complaint in intervention. We have received copies of these papers and we do not find therein any basis for criticism of the action of our Protective Committee, nor of the representation of non-enemy shareholders, as represented by the Kaufman complaint in intervention, which was approved by the Supreme Court and which has been filed and is now pending in the action. Dr. Hans Pestalozzi in his affidavit refers to some 24,000 shares, which he does not identify, and he does not indicate whether these shares belong beneficially to Interhandel itself, or to its affiliates, or whether they are shares beneficially
1063 owned by the management of the plaintiff corporation, or whether in fact they belong to shareholders who have no connection with the corporation or its management.

Dr. Hans Pestalozzi asserts, without any proof, that there is hostility to shareholders whom he represents, or whom he may represent in the future. The Kaufman complaint, which we have now reread and which we actively supported since June 1950, shows no hostility to our shareholders or to any other non-enemy shareholders of Interhandel. On the contrary, the complaint in intervention already filed, alleges the non-enemy character of the corporation, and in all the briefs and arguments filed by the attorneys for the intervention, and in all the circulars and announcements made by our Protective Committee, we have at all times expressed our support of the main claim of the corporation. If there is any hostility at all, it does not come from us or from the attorneys for the intervenors; if there is any hostility at all, it can only originate with the plaintiff corporation against the intervenors and against Schoop, Reiff & Co. for having supported the intervention, because the success of the motion for intervention

has prevented the corporation from making a settlement which, in the light of the Supreme Court decision, is far below the total non-enemy interest in the plaintiff corporation. We venture to suggest the possibility that this may have inspired the plaintiff corporation to initiate the Pestalozzi committee, in order to distract and divide the non-enemy shareholders, and to induce them not to authorize Schoop, Reiff & Co. to act for them. We call attention to the fact that, notwithstanding the announcement of the Pestalozzi committee made by the management of
1064 Interhandel on May 3rd, all of our subsequent circulars reaffirmed our faith and belief that the corporation is non-enemy, that its management stockholders are non-enemy, and our hope that it will succeed in recovering all of the vested property.

In view of all of the above, Schoop, Reiff & Co. respectfully suggests that no useful purpose would be served by the intervention of the Pestalozzi Committee, which would be a duplication of the existing intervention, and that no justification for such duplication exists, since the present intervention is in the name of the corporation for a corporate recovery, in which all non-enemy shareholders will benefit, and by which all non-enemy shareholders will be protected.

CONFEDERATION OF SWITZERLAND, CANTON AND CITY OF ZURICH, CONSULATE GENERAL OF THE UNITED STATES OF AMERICA, ss:

HANS GUT

Sworn to before me this 26th day of June 1952.

ROGER C. BREWIN, III

ROGER C. BREWIN, III
Vice Consul of the United States of America at Zurich, Switzerland duly commissioned and qualified

$2.00 Fee Stamp cancelled

(SEAL)

1067 TO THE STOCKHOLDERS OF THE INTERHANDEL

(Internationale Industrie- und Handelsbeteiligungen A. G., Basel)

As you have noted from the newspapers, the Supreme Court of the United States on April 7, 1952, handed down a decision in a so-called intervention action brought by independent stockholders who were supported in every way and to the fullest extent by the stockholders who were already participants in our protective action, which decision is of the greatest importance not only for all stockholders of the Interhandel who find themselves in a similar position but furthermore in general also protects the rights of nationals of countries who are recognized as non-enemies of the United States with regard to their interest in corporations in non-enemy States against seizure or confiscation to a far-reaching extent in the United States.

We have thoroughly examined this decision of the Supreme Court of the United States with our American attorneys, Messrs. Graubard & Moskovitz of New York, to whose initiative and efficiency this success is to a great extent due, in order to decide what conclusions must be drawn therefrom and what steps must be taken in order to represent the interests of all non-enemy independent stockholders in the best and most suitable way. This furthermore is also the reason why we are only today
1068 making this appeal to the public.

I. THE DECISION OF THE SUPREME COURT OF THE UNITED STATES

The decision establishes the following basic principle:

"Our holding is that when the Government seizes assets of a corporation which is subject to the laws of a neutral country the rights of innocent stockholders must be fully protected to the extent that they correspond to their interest in the company."

Original English text:

"Our holding is that when the Government seizes assets of a corporation organized under the laws of a neutral country, the rights of innocent stockholders to an interest in the assets proportionate to their stock holdings must be fully protected."

Thus, in actions brought by a corporation which is considered to be an enemy but is domiciled in a non-enemy country, the individual independent non-enemy stockholders will have the following rights:

a) Both those stockholders who already started or supported the intervention action and all other non-enemy independent stockholders can join, in the form of so-called intervening parties, the action by the company for the return of their seized assets.

b) Insofar as stockholders avail themselves of
1069 this right of intervention, a decision against the company will not be effective against them, but they can nevertheless enforce their rights for a share in the corporate assets proportionate to their stockholdings provided they are recognized as non-enemies.

c) The American courts must, in the action brought by the company, also protect the special legal status of the non-enemy stockholders appearing in the action independently of the company.

II. NECESSITY OF THE JOINDER OF THE BONA FIDE STOCKHOLDERS OF THE INTERHANDEL

From the decision of April 7, 1952, it is entirely clear that every independent non-enemy stockholder must decide to take an active part if he wants to secure for himself the abovementioned possibilities of protection. If he remains passive, there exists the danger that the stockholder will lose his rights should a decision unfavorable to the company as such be rendered (in the absence of intervention "petitioners' interests may be inadequately

represented and . . . they may be bound by a judgment in this corporate action".)

We have already pointed out that the so-called intervention action has been filed in the name of all independent non-enemy stockholders. The Supreme Court of the United States, as a matter of fact, also admitted the intervention action in this form, but it is indispensable that nevertheless every independent non-enemy stockholder
1070 also formally join the action. The Supreme Court of the United States at the same time decided that the rights of the independent non-enemy stockholders are to be exercised in the main corporate action and separate court proceedings are not to be introduced inasmuch as the protection of these interests must be effected as a whole in conjunction with the main action. The statements in the opinion on this point read as follows:

"But we think the questions involved in disputes like this can be more appropriately resolved in the corporate actions authorized by Section 9(a) than by resort to a multiplicity of separate actions. In such suits the non-enemy stockholder in his own right may assert his non-enemy character in order to protect his own interest from the enemy taint caused by other stockholders. Courts trying such corporate actions have adequate equitable power and procedural flexibility to protect all interests, even when the corporate recovery is not for the benefit of all stockholders but only for those who are non-enemies."

It is therefore of the greatest importance that all independent non-enemy stockholders join with each other so that they can be properly represented individually and enforce their rights jointly. The greater the number of these stockholders the greater the chance for success. The same is true in particular also of the possibility of a settlement in or out of court in order to be certain that
1071 in such a case they are given due and proper consideration. In our opinion, this can best be achieved by a joint and fully concordant course of action. Splitting

up our forces in different groups can only be harmful to our cause. Furthermore, this would only constitute a waste of valuable time and incur unnecessary expenses. In particular, we furthermore believe that the prosecution of the action of the non-enemy stockholders must be independent of the prosecution of the action by the Interhandel as such. If, as we hope, the Interhandel as such is successful in its claim for full restitution of the seized assets, the former rights of all stockholders will be again restored and the intervention action will become a moot question. If, however, this action by Interhandel is dismissed by the American courts by the application of American law because the Management or the Administration or influential stockholder groups of the Interhandel are considered enemies within the meaning of the American laws, it would certainly be extremely inadvisable and unfortunate if the independent non-enemy stockholders could not rely on independent proceedings.

We should therefore like to urge all independent non-enemy stockholders to join our protective action immediately. We can assure you that in all our efforts we are guided merely by the consideration of what is in the best interests of the independent non-enemy stockholders.

1072 III. FURTHER PROCEEDINGS

It is again pointed out that the decision of April 7, 1952, in no way prevents the Interhandel from continuing the lawsuit introduced by it. In this connection, however, there exists the special right of intervention of the independent non-enemy stockholders referred to above in Section I, as well as the right of action of the Interhandel. We shall duly exercise this right of intervention on behalf of all stockholders who join our protective action and we shall be guided by the following principles:

A. First of all, it will be endeavored to support the action of the Interhandel itself for full restitution of its assets which have been seized in the United States. In

this way, the full restoration of the status prior to the seizure could be obtained. It is to be hoped that the American courts will adopt the findings of the competent Swiss authorities which, on basis of careful investigations and pursuant to the Washington Agreement, established the Swiss character of Interhandel.

B. If, however, for any reason whatsoever the action of the Interhandel should not be successful, we shall assert to the fullest extent on behalf of all the stockholders who have joined our protective action their claims to the assets of the Interhandel seized in the U.S.A. In our opinion, all non-enemy persons who acquired Interhandel stock
1073 in good faith by purchase on Swiss stock exchanges have a right to have their interests protected in every respect. The recognition of the Swiss principles with regard to the bona fide acquisition of shares of stock of Swiss companies must therefore be striven for with all possible means before the American courts. Accordingly, all non-enemy stockholders of Interhandel who acquired their shares on a Swiss stock exchange are invited to join our protective action.

C. The decision of the Supreme Court, however, also has the result that the independent non-enemy stockholders need only accept a settlement in or out of court if this settlement corresponds to the sense and spirit of the principles established by the decision of the Supreme Court. The amount and the nature of the compensation resulting from such a settlement must therefore necessarily constitute fair compensation of the interests of a non-enemy stockholder. Last, but not least, the possibility of such a settlement again emphasizes the importance that all independent non-enemy stockholders join ir a single independent action inasmuch as in this way, particularly in the United States, the importance of the interests which are at stake for them can be most effectively made clear.

We shall endeavor to carry out our work in such a

manner that the greatest possible success is achieved in the shortest possible time. By joint action, serious
1074 conflicts of interest can be avoided which might postpone the settlement of the matter to the unforeseeable future. We have in no way obligated ourselves towards any groups of stockholders or individual stockholders and will act fully independently and exclusively in the interest of all bona fide stockholders. We also have prepared all necessary agreements with our American attorneys Graubard and Moskovitz and their Washington correspondents Fischer and Kominers so that they can represent us in the United States.

In order to be able to pay the indispensable costs and expenditures of our protective action and be able to pay the expenses and retainers of our legal advisers, we are compelled to collect a single amount of 20 Swiss francs for each share of stock which is for the first time brought under our protective action. Outside of this there are no financial obligations for shares which are for the first time brought under our protective action. All independent bona fide purchasers of Interhandel shares who desire to join our protective action can report their shares directly to us or can have this done through their bank connection.

We have prepared forms of powers of attorney which can be obtained from us and filled out by the individual stockholders and sent in directly to us. Furthermore, these forms of power of attorney can also be filled out by the individual stockholders in favor of their bank-
1075 ing connection. The signature need not be authenticated but it should be witnessed by a bank official having the right to sign for the bank. The power of attorney issued by the stockholder in favor of his banking connection will be retained by the bank. The latter, however, shall be instructed by the stockholder, pursuant to the power of attorney granted it, to issue on its part a new power of attorney for our protective action, setting forth merely the number of the shares reported. The forms

in this connection can be obtained from us by the individual banks. For each share reported, we shall issue a certification signed by us on printed forms that the report has been made, and said form shall be attached to the stock in question. A right of representation which has once been granted for a share of stock shall remain valid even though the stockholder in question later on sells the share; in other words, once a share of stock has been reported, it will continue to be represented by our Committee even if transferred unless a stockholder expressly revokes the power of attorney previously granted by him or by another. It is therefore advisable in connection with future purchases of Interhandel shares to be certain that only those shares are purchased or accepted as delivery for which the selling bank or the bank effecting the delivery submits proof by means of the attached blank of the notification that the securities have been duly brought under our protective action.

1076 Of course, it will be our endeavor to keep the stockholders who have joined our protective action currently advised of the individual steps taken by us and of any new developments.

Zurich, May 5, 1952

SCHOOP, REIFF & Co.
Aktiengesellschaft
GUT REIFF
Pelikanstrasse 6
Tel. 23 47 33

1091 Filed July 19, 1952

Answer to Complaint In Intervention

The defendants, James P. McGranery, Attorney General of the United States, and successor to the Alien Property Custodian, and Georgia Neese Clark, Treasurer of the United States, for their answer to the complaint in intervention herein, allege:

First Defense

Specifically answering the allegations contained in the numbered paragraphs of the complaint in intervention, defendants deny each and every allegation contained in the paragraphs of the complaint in intervention (and not merely the allegations of paragraphs or paragraphs which are in their entirety expressly denied below), except those paragraphs or allegations as are hereinafter expressly, and not by implication, admitted.

With respect to the specific counts and paragraphs of the complaint in intervention, the defendants:

First Count

1. Admit that the principal action and the action set forth in the complaint in intervention purport to be brought and the jurisdiction of the court is invoked under the
1092 Fifth Amendment to the Constitution of the Unit u States and the Trading with the Enemy Act, as amended (U.S. Code, Title 50, Appendix, Section 1, *et seq.*).

2. Allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations that intervenors are residents of the City, County and State of New York and are now and have been at all times since December 6, 1941 non-enemies as that terms is used in the complaint, or non-enemies or non-enemy tainted persons within the meaning of the Trading with the Enemy Act.

3. Admit, on information and belief, that plaintiff is a corporation organized under the laws of the Confederation of Switzerland.

Allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations that plaintiff has no principal office, place of business, or agent in the United States.

4. Admit that, *inter alia*, 455,624 shares of common A stock and 2,050,000 shares of common B stock of General Aniline & Film Corporation were vested by the Secretary of the Treasury and the Alien Property Custodian under the Trading with the Enemy Act and Executive Orders and regulations issued thereunder. Said vested shares of General Aniline & Film Corporation are more particularly described in the following Vesting Orders filed with and published in the Federal Register: An unnumbered Vesting Order executed and issued by the Secretary of the Treasury on February 16, 1942 (7 F.R. 1046), Vesting Order No. 5 executed and issued by the Alien Property Custodian on April 24, 1942 (7 F.R. 3148) and Vesting Order No. 907 executed and issued by the Alien Property Custodian on February 15, 1943 (8 F.R. 2453).

Admit that the predecessors of defendant James P. McGranery executed and issued certain Vesting Orders
1093 Orders whereby certain debts and other obligations were vested under the Trading with the Enemy Act and Executive Orders and regulations issued thereunder, and that pursuant to said Vesting Orders the predecessors of defendant James P. McGranery were paid the sum of One Million, Seven Hundred Seventy-Five Thousand, Three Hundred Thirty-Seven Dollars and Fifty-six Cents ($1,775,337.56). The debts and other obligations so vested are more particularly described in the following Vesting Orders filed with and published in the Federal Register: Vesting Order No. 6718 dated June 24, 1946 (11 F.R. 7643), Supplemental Vesting Order No. 6767 dated June 26, 1946 (11 F.R. 7733), Supplemental Vesting Order No. 6768 dated June 26, 1946 (11 F.R. 7733), Supplemental Vesting Order No. 6769 dated June 26, 1946 (11 F.R. 7734) executed and issued by the Alien Property Custodian and Supplemental Vesting Order No. 7874 dated October 14, 1946 (11 F.R. 13887) executed and issued by the Alien Property Custodian and amended by Amendment to Vesting Order No. 7874 dated February 16, 1948 (13 F.R. 1180) executed

and issued for the Attorney General, as successor to the Alien Property Custodian, by the Director of the Office of Alien Property.

Admit that by virtue of Executive Order No. 9788, dated October 14, 1946 and effective October 15, 1946, filed with and published in the Federal Register (11 F.R. 11981, error corrected 11 F.R. 12123), the Office of Alien Property Custodian was terminated and the Attorney General became the successor to the Alien Property Custodian.

Admit that pursuant to Executive Order No. 9788 the aforementioned shares of stock of General Aniline & Film Corporation were transferred to the predecessor of the defendant James P. McGranery and are now in the possession of and vested in the defendant James P. McGranery, Attorney General of the United States, as successor to the Alien Property Custodian.

1094 Admit that pursuant to Executive Order No. 9788 the aforementioned sum of money was transferred or paid to the predecessors of defendant James P. McGranery and is now vested in defendant James P. McGranery, Attorney General of the United States, as successor to the Alien Property Custodian, and is on deposit with the defendant Georgia Neese Clark, Treasurer of the United States, in an account in the United States Treasury in the name of James P. McGranery, Attorney General of the United States, as successor to the Alien Property Custodian.

Admit that prior to the issuance of the aforementioned unnumbered Vesting Order dated February 16, 1942, Vesting Order No. 5 and Vesting Order No. 907, General Aniline & Film Corporation had acquired and at the time of vesting held as lawful owner 28,600 50%-paid and 56,300 100%-paid bearer shares of common stock of the plaintiff corporation.

Admit that between December 1, 1944 and October 18, 1946 General Aniline & Film Corporation paid and transferred to the predecessors of defendant James P. Mc-

Granery as dividends on the vested shares of General Aniline & Film Corporation, 28,238 50%-paid and 55,610 100%-paid bearer shares of the common stock of the plaintiff corporation.

Admit that of the aforementioned shares of plaintiff corporation, 27,416 50%-paid shares and 53,984 100%-paid shares were paid and transferred as dividends on the shares of General Aniline & Film Corporation for the return of which plaintiff has brought suit, and 822 50%-paid and 1,626 100%-paid shares were paid and transferred as dividends on 20,031 shares of common A stock of General Aniline & Film Corporation which plaintiff does not claim.

Admit that defendant James P. McGranery, Attorney General of the United States, as successor to the Alien Property Custodian, and his predecessors have at all times thereafter held the aforementioned shares of plaintiff corporation as lawful owner thereof.

1095 Admit that the vested stock of General Aniline & Film Corporation has been valued, since the institution of the principal action, by plaintiff as in excess of $100,000,000 and by defendants has been said to have been variously estimated in value at from $50,000,000 to $100,000,000.

5. Admit that on or about February 1, 1943, the plaintiff filed with the then Office of Alien Property Custodian a document under oath, in the form required by the Alien Property Custodian, entitled "Notice of Claim for Return of Property" with respect to 455,448 shares of A stock and 2,050,000 shares of B stock of the General Aniline & Film Corporation and all dividends and increment on said shares, vested under Vesting Order No. 5.

Admit that on or about June 2, 1948, the plaintiff filed with the predecessor of the defendant James P. McGranery documents under oath, in the form required by the predecessor of the defendant James P. McGranery, entitled "Notice of Claim for Return of Property" with respect to 455,448 shares of A stock and 2,050,000 shares of B stock

of the General Aniline & Film Corporation and all dividends and increment on said shares vested under Vesting Order No. 5, with respect to 176 shares of A stock of General Aniline & Film Corporation and all dividends and increment on said shares vested under Vesting Order No. 907, with respect to $975,244.70 alleged to have been vested under Vesting Order No. 6718, with respect to $308,750.00 alleged to have been vested under Supplemental Vesting Order No. 6767, with respect to $402,412.50 vested under Supplemental Vesting Order No. 6768, with respect to $47,125.00 vested under Supplemental Vesting Order No. 6769, and with respect to $108,750.00 vested under Supplemental Vesting Order No. 7874, as amended.

Assert that the allegations that the aforementioned claims were filed by the plaintiff within the time limited by law are conclusions of law and do not require an answer.

1096 Admit that the aforementioned claims filed by the plaintiff were disallowed by an order of the Director of the Office of Alien Property dated October 5, 1948.

Admit that plaintiff filed its complaint in the principal action on October 21, 1948, and refer to said complaint for its contents and to the amended answer to said complaint for admissions as to the contents of said complaint.

Assert that the allegations as to the jurisdiction invoked by said complaint, as to its theory and as to its pattern upon and identity with the complaint of the plaintiff in *Uebersee Finanz-Korp.* v. *United States*, 332 U.S. 480, are conclusions of law and do not require an answer.

Assert that the allegation that the complaint in the principal action was filed by plaintiff within the time limited by law is a conclusion of law and does not require an answer.

Admit that the answer of defendants, including a counterclaim, was filed March 4, 1949, and that the amended answer of defendants, including five counterclaims, was filed on January 26, 1950, and that plaintiff filed a reply to

the first counterclaim on May 10, 1949 and to the second, third, fourth and fifth counterclaims on July 2, 1951.

Admit that depositions in the principal action have consumed a substantial amount of time.

Allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in the seventh sentence of paragraph 5.

6. Deny each and every allegation contained in paragraph 6.

7. Allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in the first and second sentences of paragraph 7 and assert that the allegations contained in the third sentence of paragraph 7 are conclusions of law and do not require an answer.

1097 8. Admit that plaintiff has not made in the principal action the claim described in paragraph 6 of the First Count of the complaint in intervention.

Allege that they are without knowledge or information sufficient to form a belief as to the truth of each and every other allegation contained in paragraph 8.

Deny that there is any settlement pending or under negotiation between plaintiff and defendants or proposed by or to defendants.

9. Allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in the first sentence of paragraph 9.

a). Admit that it appears of record in the principal action that at least 10.9 per cent of the shareholders of plaintiff were nationals of Germany, and therefore enemies, at the time the properties involved were vested.

Assert that the allegation contained in the second sentence of subparagraph (a) is a conclusion of law and does not require an answer.

Allege that the third sentence of subparagraph (a), insofar as it alleges conflicting interests within plaintiff corporation, is an allegation of fact as to which defendants are without knowledge or information sufficient to form a belief as to the truth thereof; insofar as it alleges the legal obligations of plaintiff's management or managing directors or trustees to the stockholders and the qualifications of plaintiff's management or managing directors or trustees to present certain issues, is a conclusion of law and does not require an answer and it is, to an extent, an allegation of the law of Switzerland as to which defendants are without knowledge or information sufficient to form a belief as to the truth thereof.

1098 (b). Admit that at the time of the outbreak of World War II and as of the time of vesting at least approximately 39 per cent of the voting stock of plaintiff was claimed to be owned, at least ostensibly, by a group of shareholders referred to as the Sturzenegger Group or Complex.

Allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations that approximately 39 per cent of the voting stock of plaintiff is at present owned by said Group or Complex and that this Group or Complex has working control of the corporation and is responsible for the selection of its management.

Admit that defendants, through their counsel, have asserted in this proceeding, *inter alia*, that plaintiff was a cloak for I. G. Farbenindustrie, the giant German Chemical combine, because of, *inter alia*, I. G. Farbenindustrie's domination of the Sturzenegger Group.

Admit that it is asserted of record in the principal action by counsel for defendants that the Sturzenegger Group "owns and is I. G. Chemie"; that "It is our position, furthermore, that the private banking firm

of G. Sturzenegger has been the dominant controller of this plaintiff for the purposes of I. G. Farben"; that "Sturzenegger is the leader of a group of corporations known as the Sturzenegger Companies and they own much and they own a predominating share in the plaintiff"; and that "Hans Sturzenegger is the epitome of the plaintiff. He is—and this is our term, it is our charge that he is the arch conspirator. He is the head of the tainted corporations, which are circular in nature and which own a large block of stock in the plaintiff. He dominates the plaintiff."

1099 Assert that the allegation contained in the fifth sentence of subparagraph (b) is a conclusion of law and hypothetical and does not require an answer.

Allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations (insofar as such allegations are not conclusions of law not requiring an answer). that it is contrary to the interests of the Sturzenegger Group and of the management or managing directors or trustees of plaintiff, to the extent such management or managing directors or trustees represent the Group, to draw any distinction between enemy and non-enemy interests in plaintiff of the nature set forth in paragraph 6 of the first count of the complaint in intervention.

(c). Allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations with respect to the views, opinions, statements and intentions, with respect to the claim of intervenors, of plaintiff or its management or managing directors or trustees.

Assert that the allegations with respect to the complaint of plaintiff and a holding of the Supreme Court of the United States on a substantially similar com-

plaint are conclusions of law and do not require an answer.

Admit that it appears of record in the principal action that at least 10.9 per cent of plaintiff's stockholders were nationals of Germany, and therefore enemies, at the time the properties involved were vested.

Assert that the allegations contained in the last sentence of paragraph 9 are conclusions of law and do not require an answer.

10. Assert that the allegations that the properties involved in the principal action are subject to the control or disposition of this Court are conclusions of law and do not require an answer.

1100 11. Admit that the intervenors allege that they assert the claim contained in the first count of the complaint in intervention on behalf of plaintiff in a derivative capacity, and on behalf of all non-enemy stockholders of plaintiff eligible under the Trading with the Enemy Act to participate in the benefits of the return to plaintiff of any of the properties involved in this proceeding.

12. Deny each and every allegation contained in paragraph 12.

13. Allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in the first, second and third sentence of paragraph 13.

(a), (b), and (c). For their answer to subparagraphs (a), (b), and (c) of paragraph 13, defendants repeat and adopt their answer to subparagraphs (a), (b), and (c) of paragraph 9 of the first count.

(d). Admit that plaintiff and defendants have intermittently negotiated for a settlement of the principal action from October 1949 until shortly prior to April

7, 1952, and that the fact of such negotiations appeared of record in the principal action for the first time in the latter part of 1949.

Deny that there is any settlement pending or under negotiation between plaintiff and defendants or proposed by or to defendants.

Allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations of the intentions of plaintiff with respect to a settlement.

Assert that the allegation that plaintiff corporation is not otherwise amenable to the jurisdiction of the courts of the United States is a conclusion of law and does not require an answer.

1101 (e). Allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in subparagraph (e).

14. Assert that the allegations that there is no effective remedy to protect intervenors and other stockholders of plaintiff similarly situated except intervention herein are conclusions of law and do not require an answer.

SECOND COUNT

1. Repeat and adopt the allegations and denials of their answer made in paragraphs 1, 2, 3, 4, 5, 6 and 7, First Count, First Defense, *supra*.

2. Admit that during the latter portion of 1949, plaintiff and defendants actively sought to effect a negotiated settlement of the principal action.

Admit that a principal obstacle to effecting any such settlement was the pendency of the claim of the intervenor, Remington Rand, Inc., which claimed an option to purchase from plaintiff a portion of the vested property for the sum of approximately $25,000,000.

Admit that the fact of such negotiations for settlement first appeared on the record of the principal action when

on October 25, 1949, during the progress of such negotiations, defendants moved this Court for an order adjudging that defendants and plaintiff were entitled to settle the principal action regardless of any right which the intervenor, Remington Rand, Inc., had or asserted to the contrary.

Admit that the aforementioned motion of defendants was denied by this Court on December 21, 1949; that defendants' motion for rehearing thereof was denied by this Court on January 18, 1950; that an appeal therefrom by defendants was dismissed by the United States Court of Appeals for the District of Columbia Circuit on October 18, 1950.

Deny that there is any settlement pending or under negotiation between plaintiff and defendants or proposed by or to defendants.

1102 3. Admit that upon a trial of the issues involved in the complaint in intervention of Remington Rand, Inc., a judgment adverse to the intervenor, Remington Rand, Inc., was entered by this Court on April 26, 1950. That judgment was on March 29, 1951 affirmed by the United States Court of Appeals for the District of Columbia Circuit (188 F. 2d 1011). On October 8, 1951 the Supreme Court of the United States denied a petition for a writ of certiorari (342 U.S. 832) and on November 26, 1951 the Supreme Court of the United States denied a petition for rehearing of the petition for a writ of certiorari (342 U.S. 889).

Admit that the intervention of Remington Rand, Inc., having been dismissed as stated above, at this time poses no obstacle to any settlement of the principal action by the proper parties to such a settlement.

4. Deny that there is any settlement pending or under negotiation between plaintiff and defendants or proposed by or to defendants.

5. Deny that there is any settlement pending or under negotiation between plaintiff and defendants or proposed by or to defendants.

Assert that the allegations contained in paragraph 5 are conclusions of law and do not require an answer.

6. Deny that there is any settlement pending or under negotiation between plaintiff and defendants or proposed by or to defendants.

Assert that the allegations contained in the first, third and fourth sentences of paragraph 6 are conclusions of law and do not require an answer.

7. Allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations that plaintiff, the intervenors, and any other stockholders are not adequately represented by the management of plaintiff which controls and is conducting the principal action, because of the conflicting interests within
1103 plaintiff and the embarrassment of the present corporate management arising from the question whether it is enemy or non-enemy controlled.

Deny that there is any settlement pending or under negotiation between plaintiff and defendants or proposed by or to defendants.

(a) Admit that it appears of record in the principal action that at least 10.9 per cent of the shareholders of plaintiff were nationals of Germany, and therefore enemies, at the time the properties involved were vested.

Deny that there is any settlement pending or under negotiation between plaintiff and defendants or proposed by or to defendants.

Allege that the third sentence of subparagraph (a), insofar as it alleges conflicting interests within plaintiff corporation, is an allegation of fact as to which defendants are without knowledge or information sufficient to form a belief as to the truth thereof; insofar

as it alleges the legal obligations of plaintiff's management or managing directors or trustees to the stockholders and the qualifications of plaintiff's management or managing directors or trustees to negotiate a settlement, is a conclusion of law and does not require an answer and it is, to an extent, an allegation of the law of Switzerland as to which defendants are without knowledge or information sufficient to form a belief as to the truth thereof.

(b). Admit that at the time of the outbreak of World War II and as of the time of vesting at least approximately 39 per cent of the voting stock of plaintiff was claimed to be owned, at least ostensibly, by a group of shareholders referred to as the Sturzenegger Group or Complex.

Allege that they are without knowledge or information sufficient to form a belief as to the truth of
1104 the allegations that approximately 39 per cent of the voting stock of plaintiff is at present owned by a group of shareholders referred to as the Sturzenegger Group and that this Group has working control of the corporation and is responsible for the selection of its management.

Admit that defendants, through their counsel, have asserted in this proceeding, *intr alia*, that plaintiff was a cloak for I. G. Farbenindustrie, the giant German Chemical combine, because of, among other reasons, I. G. Farbenindustrie's domination of the Sturzenegger Group.

Admit that it is asserted of record in the principal action by counsel for defendants that the Sturzenegger Group "owns and is I. G. Chemie"; that "It is our position, furthermore, that the private banking firm of G. Sturzenegger has been the dominant controller of this plaintiff for the purposes of I. G. Farben"; that "Sturzenegger is the leader of a group of corporations known as the Sturzenegger Companies and

they own much and they own a predominating share in the plaintiff"; and that "Hans Sturzenegger is the epitome of the plaintiff. He is—and this is our term, it is our charge that he is the arch conspirator. He is the head of the tainted corporations, which are circular in nature and which own a large block of stock in the plaintiff. He dominates the plaintiff."

Allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations (insofar as such allegations are not conclusions of law not requiring an answer) that since it is the possible enemy status or enemy-taint of the Sturzenegger Group which in largest measure impels plaintiff corporation to effect a compromise of its claim, that it is contrary to the interests of the Sturzenegger Group and the management or
1105 managing directors or trustees of plaintiff corporation, to the extent such management or managing director or trustees represent the Group, to draw any distinction between enemy and non-enemy interests in plaintiff of the nature set forth in paragraph 6 of the first count of the complaint in intervention.

Deny that there is any settlement pending or under negotiation between plaintiff and defendants or proposed by or to defendants.

(c). For their answer to subparagraph (c) of paragraph 7, defendants repeat and adopt their answer to subparagraph (c) of paragraph 9 of the first count.

(d). Allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations that the management of plaintiff controls and is conducting the principal action.

Deny that there is any settlement pending or under negotiation between plaintiff and defendants or proposed by or to defendants.

Assert that the allegations contained in the last sentence of paragraph 7 are conclusions of law and do not require an answer.

8. Assert that the allegations that the properties involved in the principal action are subject to the control or disposition of this Court are conclusions of law and do not require an answer.

Deny that there is any settlement pending or under negotiation between plaintiff and defendants or proposed by or to defendants.

9. Admit that intervenors allege that they assert the claim contained in the second count of the complaint in intervention on behalf of plaintiff in a derivative capacity, and on behalf of all non-enemy stockholders of plaintiff eligible under the Trading with the Enemy Act to participate in the benefits of the return to plaintiff of any of the properties involved in this proceeding.

1106 10. Deny each and every allegation contained in paragraph 10.

11. Allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in the first, second and third sentences of paragraph 11.

(a) and (b). For their answer to subparagraphs (a) and (b) of paragraph 11, defendants repeat and adopt their answer to subparagraphs (a) and (b) of paragraph 7 of the second count.

(c). For their answer to subparagraph (c) of paragraph 11, defendants repeat and adopt their answer to subparagraph (c) of paragraph 9 of the first count.

(d) and (e). For their answer to subparagraphs (d) and (e) of paragraph 11, defendants repeat and adopt their answer to subparagraphs (d) and (e) of paragraph 13 of the first count.

THIRD COUNT

1. Repeat and adopt the allegations and denials of their answer made in paragraphs 1, 2, 3, 4, 5, 6 and 7, First Count, First Defense, and paragraphs 2, 3, 4, 5 and 6, Second Count, First Defense, *supra*.

2. Allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations that intervenors and any other stockholders similarly situated are not adequately represented by the management of plaintiff which controls and is conducting the principal action.

Deny that there is any settlement pending or under negotiation between plaintiff and defendants or proposed by or to defendants.

Assert that the allegations contained in the second sentence of paragraph 2 are conclusions of law and do not require an answer.

3. Assert that the allegations that the properties involved in the principal action are subject to the control or disposition of this Court are conclusions of law and do not require an answer.

1107 Deny that there is any settlement pending or under negotiation between plaintiff and defendants or proposed by or to defendants.

4. Admit that intervenors allege that they assert the claim contained in the third count of the complaint in intervention on behalf of themselves and other non-enemy shareholders of plaintiff similarly situated.

5. Deny each and every allegation contained in paragraph 5.

SECOND DEFENSE

The complaint fails to state a claim against defendants upon which relief can be granted.

THIRD, PARTIAL DEFENSE

to the extent that intrevenors Kaufman purport to assert, whether through plaintiff corporation or directly, the rights or a claim to ultimate recovery on behalf of stock-

holders of plaintiff corporation other than themselves individually and as general guardians of the persons and property of Emil Gert Kaufman and Ruth Mirjam Kaufman,

Notices of claim for the property described in paragraph 4 of the first count of the complaint in intervention have not been filed within the time limit prescribed by the Trading with the Enemy Act, as amended (U.S. Code, Title 50, Appendix, Sec. 1, *et seq.*), particularly Section 33 thereof.

FOURTH, PARTIAL DEFENSE

to the extent that intervenors Kaufman purport to assert, whether through plaintiff corporation or directly, the rights or a claim to ultimate recovery on behalf of stockholders of plaintiff corporation other than themselves individually and as general guardians of the persons and property of Emil Gert Kaufman and Ruth Mirjam Kaufman,

The complaint in intervention has not been filed within the time limit prescribed by the Trading with the Enemy Act, as amended (U.S. Code, Title 50, Appendix, Sec. 1, *et seq.*), particularly Section 33 thereof.

1108 FIFTH, PARTIAL DEFENSE

to the extent that intervenors Kaufman purport to assert, whether through plaintiff corporation or directly, the rights or a claim to ultimate recovery on behalf of themselves individually and as general guardians of the persons and property of Emil Gert Kaufman and Ruth Mirjam Kaufman,

With respect to the property vested by Vesting Orders No. 6718, dated June 24, 1946, and Nos. 6767, 6768 and 6769, dated June 26, 1946 (more particularly described in paragraph 4, First Count, First Defense, herein), intervenors have failed to institute suit within the time limit prescribed by the Trading with the Enemy Act, as amended (U.S. Code, Title 50, Appendix Sec. 1, *et seq.*), particularly Section 33 thereof.

COUNTERCLAIMS

For counterclaims against intervenors, defendants adopt and incorporate herein the First, Second, Third, Fourth and Fifth Counterclaims asserted against plaintiff, set out in the Amended Answer of defendants to the complaint in the principal action, filed herein January 26, 1950, and assert said First, Second, Third, Fourth and Fifth Counterclaims against intervenors, individually and in whatever capacities in which they sue and against any and all those on whose behalf they may sue or whose rights or a claim to recovery, direct or indirect, they assert.

WHEREFORE:

1. defendants demand judgment dismissing the Complaint in Intervention herein, together with the costs and disbursements in the action.

1109 2. defendants adopt and incorporate herein the prayers and demands for relief contained in the second, third, fourth, fifth and sixth prayers for relief in the Amended Answer of defendants to the complaint in the principal action, filed herein January 26, 1950, and demand judgment against intervenors for said relief.

3. defendants demand such other and further relief as is just and proper in the premises.

ROWLAND F. KIRKS
Acting Director
Office of Alien Property
DAVID SCHWARTZ,
Special Assistant to the Attorney General
SIDNEY B. JACOBY
PAUL E. McGRAW
OLGA H. HOFFMANN
ANTHONY W. GROSS
Office of Alien Property
Department of Justice
Attorneys for Defendants.

Dated: Washington, D. C.
July 16, 1952

1111 Filed July 23, 1952

Opinion on Motion of Ernest Attenhofer for Leave to Intervene

Ernest Attenhofer has moved for leave to intervene on behalf of himself and all other non-enemy stockholders similarly situated. He alleges he acts for himself and for 554 non-enemy stockholders of plaintiff, owning 24,411 shares of its stock. Neither the plaintiff nor the Government opposes the Attenhofer intervention, although the Government reserves all rights on the merits if the intervention is allowed. The intervenors Kaufman *et al.* object and also suggest that the Master has no jurisdiction on the ground the Motion to Intervene is outside the order of reference. The Government has its doubts on this point; plaintiff and Attenhofer perceive no jurisdictional difficulty.

1112 *Jurisdiction of Master:*

This Court's order of reference dated February 14, 1950, refers to the Master "the determination and finding of all issues of fact and law . . . excepting only those in the proceedings in intervention now on trial in this Court" (The Remington-Rand intervention). It gives the Master power to hear all motions except those which would change "the nature of the action or this reference" (with other exceptions not here pertinent). It is difficult to perceive how the present intervention could have either of these results. Chemie's suit is *in personam;* so, too, is Kaufman's intervention and Attenhofer's; each asks for precisely the same type of relief as the others. It is true that Kaufman proceeds by way of a derivative stockholders' suit whereas Attenhofer asserts his right directly. This, however, results from their varying interpretation of the Supreme Court's decision in *Kaufman* v. *Societe,* 96 L. Ed. 522, decided April 7, 1952; it concerns the mode by which Kaufman and Attenhofer would attempt to achieve the result, not the result itself, i.e., a recovery in each case for the

ultimate benefit of the individual non-enemy stockholder. It cannot, therefore, be said that in any real sense Attenhofer's motion would change "the nature of the action"; if the nature of the action has been changed, it is the Supreme Court's decision, not Kaufman or Attenhofer that has changed it. However, it seems clear that the action itself, Chemie's suit, remains the same; there is merely added to it new parties, who seek the same relief, *pro tanto*, as Chemie, in the event Chemie fails. Both intervenors would therefore remain on the sidelines for the present and hence whatever else might be said later, there is certainly no present change in the nature of the action. It is believed, therefore, that the Master has jurisdiction to consider the present motion.

1113 *On the Merits:*

The intervention of the Attenhofer group is based on their interpretation of the Supreme Court's decision in the *Kaufman* case to permit a direct assertion of a non-enemy stockholder's right as distinguished from its assertion in the form of a derivative stockholder's intervention. The Master is of the opinion that while the Supreme Court validated the right of a non-enemy stockholder to assert his *pro tanto* claim by a derivative suit (intervention), it did not close the door to direct individual assertions of the right. The Supreme Court quoted its holding in *Clark* v. *Uebersee Finanz-Korp. A.G.*, 332 U.S. 485, to the effect that the object of the 1941 amendment was "not to appropriate friendly or neutral assets". The Court stated that the corporate veil could be pierced; that Congress did not intend that "innocent interests must be confiscated because of the guilt of other stockholders"; hence the rights of innocent stockholders must be fully protected. The Court repudiated any idea that its holding was based on any technical concept of derivative rights appropriate to the law of corporations and said:

"It is based on the Act which enables one not an enemy as defined in Sec. 2 to recover any interest, right or title which he has in the property vested" (*Kaufman* v. *Societe Internationale*, 96 L. Ed. 522, 524).

Later the Court referred to its holding that "Congress has recognized that non-enemy stockholders of non-enemy foreign corporations have a severable interest in corporate assets seized by the Custodian" and hence Kaufman was entitled to intervene.[1]

1114 These statements show the Court was concerned with substantive rights as distinguished from the machinery for their assertion. It is true that in the case before it these rights were asserted by means of a derivative stockholder's intervention, but there is nothing in the opinion showing this is the only way in which they could be asserted. Such a construction would impute adjective dicta to the Court in an opinion plainly limited to a single narrow question of substantive right. Also, the overriding congressional policy found by the Supreme Court in the Act may transcend technical concepts of corporation law as to the nature of stockholders' interests, etc. (*Cf. Donnell* v. *Herring-Hall-Marvin Safe Co.*, 208 U.S. 267, 273; *Klein* v. *Board of Supervisors*, 282 U.S. 19, 24).

It is difficult therefore to agree with Kaufman's argument (Tr. 88-91, 108-109, 142-143, 160-161) that the Supreme Court was presented with the question as to whether non-enemy interests could be asserted by a derivative stockholder's suit or directly and that the Court intended in its opinion to exclude the latter. Kaufman's petition for a writ of certiorari (p. 2-4) does not present this specific question and it is well known that a grant of certiorari is limited to the questions presented in the petition.

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[1] In *Albert* v. *McGrath*, U.S.D.C. Cal. May 12, 1952 (unreported) the Court (Judge Yankwich) construed the *Kaufman* decision to hold the non-enemy interests were severable.

(*Alice State Bank* v. *Houston Pasture Co.*, 247 U.S. 240, 242; *Washington, Va. & Md. Coach Co.* v. *NLRB*, 301 U.S. 142, 146; *Helvering* v. *Taylor*, 293 U.S. 507, 511; *Clark* v. *Williard*, 294 U.S. 211, 216; *Morehead* v. *New York*, 298 U.S. 587, 604-605). Nor can the background of the Supreme Court case—proceedings below, briefs, arguments, etc.—be permitted to supply a holding not found in the opinion itself.

It follows that so far as *Kaufman* v. *Societe* is concerned, Attenhofer and his group may assert their right as
1115 they see fit provided they come within the FRCP and no legal bar obstructs.

Attenhofer contends he is entitled to intervene under Rule 24 (a) (3) FRCP on the ground he and his group would be adversely affected by the distribution of the property herein which, he says, constitutes a *res* in the custody of the Court or subject to its control.[1] (Tr. 15-18; 37-38). Whether he can intervene on this ground seems very doubtful. The present suit is solely of statutory origin (Sec. 9 (a) of the Trading With the Enemy Act) and has all the indicia of an action *in personam*. (*Cf. Sigg Fehr* v. *White*, 285 F. 949; *Cummings* v. *Hardee*, 102 F. (2) 622.) The injunctive provision of that section, preventing disposition of the assets until the court's decision, does not convert the suit into an *in rem* proceeding; it is simply a freeze order designed to maintain the *status quo*. Nor can it be said that in any real sense property in the possession of the Alien Property Custodian is "in the custody or subject to the control or disposition of the court." No court process has touched it; it passes to plaintiff or remains with defendant depending on the court's *in personam* judgment. Indeed the injunctive provisions of Section 9 (a) appear to put the property entirely outside the court's control from

[1] Attenhofer makes various claims as to the right to intervene under Rule 23, covering class actions. That rule governs the right to embody a class action in an intervention; the right of intervention itself seems governed by Rule 24.

the day suit is filed. During all this time, the property may be used by the Custodian without court supervision, the sole condition being that it be held intact. (See 50 U.S.C.A. App. Sec. 5 (b) (1), Sec. 12, Sec. 9 (f).)

1116 Hence the Master perceives no ground for intervention on the basis of Rule 24 (a) (3) FRCP. In the same way, there appears no ground for intervention on the basis of common questions of law and fact under Rule 24 (b) (2) FRCP. It seems quite apparent there are no common questions of fact; the question of enemy taint is individual as to each stockholder. Nor do there appear to be common questions of law; any question of law would arise in the fact-pattern of each particular case. Certainly there is no common question of law in the sense that its decision would mean a recovery *vel non* for plaintiff or Attenhofer, or even Kaufman.

Attenhofer, however, is on stronger ground in urging his right to intervene under Rule 24 (a) (2) FRCP on the ground representation by existing parties is or may be inadequate. The Supreme Court in the *Kaufman* case has already ruled out plaintiff as providing adequate representation and has held that intervenors might be bound by a judgment in the main case (Op., p. 525). Attenhofer points out that as to Kaufman, the latter has stated in so many words in the Supreme Court that plaintiff was dominated by officers and stockholders who were enemy tainted.[1] The Attenhofer group, however, is a management-sponsored group—some of the management are members of it (Pestalozzi Affidavit, par. 14), and it by no means admits any enemy taint on the part of plaintiff's management. (Tr. 20-22; 26). It poses the question whether the Kaufman group, differing from it as it does on this fundamental and sensitive matter, has the right to represent the

1117 Attenhofer group to the exclusion of Counsel of their own choice. (Tr. 23-27, 30, 51-54, 154-155, 167).

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[1] See also Kaufman's brief in the Supreme Court, p. 39-40; par. 9, Kaufman Amended Complaint.

To this Kaufman replies that the adequacy of his representation is a question of fact to be determined later on the basis of Kaufman's performance—how he handles the matter for the Attenhofer group; that until the latter shows that Kaufman has not and cannot adequately represent the Attenhofer group, he is entitled to make the effort.[1] (Tr. 118-119, 161-162). The basis for this contention is the claim that the Kaufman intervention is a true class action which settles the matter presented once and for all and rules out any other intervention having the same object.

Even a casual examination of the nature of the non-enemy claims in the light of the Supreme Court decision shows the fallacy of these contentions. It seems quite clear that if Kaufman wins his suit (intervention) for himself and his group it will have no effect on Attenhofer's; the same would be true if he loses it; Attenhofer would still have the right to try out the question of his own freedom from enemy taint. Hence no decision in the case of Kaufman or his group would amount to *res judicata* against Attenhofer, who is not presently before the Court as a party and this is a prerequisite if he is to be found. (*Albrecht* v. *Bauman*, 76 App. D.C. 189; 130 F. (2) 979; *Pennsylvania Co.* v. *Deckert*, 123 F. (2d) 979, 984). It is difficult to perceive how the Court could validly
1118 determine Attenhofer's rights in his absence. (*Hansberry* v. *Lee*, 311 U.S. 32, 40-44). It cannot therefore be said that Kaufman, by operation of law (so to

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[1] It would seem that on principle the opposite should be the rule—that one who claims he adequately represents others should have the burden of proving it. This was the holding of *Weeks* v. *Bareco Oil Co.*, 125 F. (2) 84, 93-94. The claim that Kaufman adequately represents Attenhofer and his group is denied under oath. (Aff. of Dr. Hans Pestalozzi, par. 9-14); see also *Kaufman* v. *Societe*, *supra*, which can be judicially noticed, as to Kaufman's concession of Chemie's enemy taint. The affidavit of Irving Moscovitz, Esq., denies "hostility" but the statement in the Supreme Court opinion (p. 523) seems determinative. Assuming that under *Sutphen Estates* v. *U.S.*, 96 L. Ed. 4, 6 the burden is on Attenhofer in this type of intervention, it would appear the burden has been fairly met.

speak) or force of circumstances, represents Attenhofer. The plain fact is that Kaufman represents only himself and his group; this follows inevitably from the Supreme Court's holding that freedom from enemy taint is a personal and individual matter. There is thus no opportunity for Kaufman to claim he represents a class; it is quite evident that there is no class. Or if there is a class, it is a class of individuals with individual rights entitled to an individual hearing; this is the very essence of the Supreme Court decision.[1] In contrast to the present case it will be found that in the true class suit individuals cannot be heard *seriatim*[2] because the decision of the main question puts everyone else out of court; the question in the case (on the merits) has been decided and there is nothing left for assertion.[3]

The Master is therefore of the belief that the Supreme Court opinion leaves open the assertion of the rights of non-enemy stockholders by direct action, which im-
1119 ports their right to be represented by counsel of their own choice in the contingencies covered by Rule 24 (a) (2). While as already seen, the Master is of the opinion that Attenhofer and his group ought not, on principle, to be bound by the outcome of Kaufman's suit, there is, of course, no certainty about the matter. Rule 24 (a) (2) permits intervention when "the applicant is or *may be* bound by a judgment in the action," and does not require

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[1] Where the stockholders' interest is individual and severable, there is no true class suit. 3 *Moore's Fed. Prac.*, Sec. 23.08; *Hansberry* v. *Lee*, 311 U.S. 32; *Knowles* v. *War Damage Corp.*, 83 App D.C. 388, 171 F. (2) 15, 18; *Weeks* v. *Bareco Oil Co.*, 125 F.(2) 84.

[2] Except as to damages in the event the primary right is upheld.

[3] Thus where a class suit is brought to enforce the statutory liability of bank stockholders (*R.F.C.* v. *Central Republic Trust Co.*, 11 F. Supp. 976, an adverse decision of this question naturally binds all later plaintiffs; so, too, in a suit to enforce a director's liability (*U. S. Smelting Co.* v. *Hofkin*, 245 F. 896) or in a class suit to obtain division of church property (*Smith* v. *Swormstedt*, 16 How. 288); or a class suit attacking a reorganization plan (*Supreme Tribe of Ben-Hur* v. *Cauble*, 255 U.S. 356; *cf. Moore's Fed. Prac.*, Sec. 23.11).

a legal certainty before intervention will be allowed. The Supreme Court sustained Kaufman's right to intervene on the contingency that he "may be" bound by the judgment in the main case. If this provision of the rule is deemed to refer to Chemie, the Supreme Court's holding relative to Kaufman is equally decisive as to Attenhofer. If, however, in the present circumstances, Attenhofer's right to intervene be dependent upon the binding effect of *Kaufman's* judgment, it seems sufficient to say that it is impossible to be dogmatic about the matter at this time. Some future court might, for all we know, adopt Kaufman's theory *in toto*.

From another angle, intervention would seem proper on the basis of *Missouri-Kansas Pipe Line Co.* v. *U.S.*, 312 U. S. 502, 505, 508, holding that Rule 24 (a) FRCP is not "a comprehensive inventory of the allowable instances for intervention." (See 4 *Moore's Fed. Prac.*, p. 33.) The present case is equally unusual and equally requires allowance of intervention because of the unusual circumstances of the case. It is quite understandable that Attenhofer and his group should not wish to present their proof of lack of enemy taint through parties and counsel who are already on record as admitting such taint as to some at least of the Attenhofer group. Also, the Attenhofer group feels their approach is more direct and avoids difficulties of Swiss corporation law as well as possible attempts to use their recovery to pay corporate debts, foreign or domestic. These factors are fairly to be weighed in considering whether Attenhofer's group would, technically, be bound by the decision in Kaufman's case under Rule 24 (a) (2), bearing in mind the novel problem presented.

1120

The conclusion therefore is reached that Attenhofer and his group are entitled to intervene.[1] Their intervention is

[1] Certain practical objections to Attenhofer's group asserting their rights in the way they wish were pointed out, i.e., the Anti-Assignment statute, the Statute of Limitations, set-off, etc. (Tr. 27-31, 102, 104, 114, 123). Attenhofer's counsel stated he had considered these possibilities. (Tr. 30).

subject, however, to the proviso that Kaufman's counsel shall be entitled, in the event of an ultimate recovery by non-enemy stockholders as such to present their claims for reasonable compensation for producing the Supreme Court decision on which the rights of all such claimants depend.

The expenses of the litigation eventuating in that
1121 decision, including counsel fees, should therefore, in justice, be borne by all non-enemy stockholders who will benefit from it.[1] If in computing counsel fees the size of the recovery is to be taken into consideration, the amount of the total recovery should govern, irrespective of group or individual representation.

Should Individual Claims Be Filed:

A final question was presented in argument as to whether the individual non-enemy stockholders should be required to file their claims and enter their appearance by name in this Court at this time. (Tr. 50-51, 62-71, 114, 118-139). The Government thinks this would be the proper procedure so as to give it fair notice and thus avoid an avalanche of individual fact questions at the end of the case, in the event the Government wins the main suit. (Tr. 62-67, 69-71). The Attenhofer group are apparently willing to enter their individual appearances now or at an appropriate time (Tr. 50-51, 163). The Kaufman group, of course, opposes any individual claims at all being asserted by the Attenhofer group and as to its own group feels that proof of non-enemy taint by categories or in other group ways might be possible (Tr. 106-107, 116-117). The *amicus curiae*[2] in a memorandum and orally suggests there is no need for individual stockholders to enter their appearance until
1122 Chemie's main case has been decided, unless there

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[1] In *Kaufman* v. *Societe*, 96 L. Ed. 522, 525, the Supreme Court said that courts trying cases such as the present "have adequate equitable power and procedural flexibility to protect all interests . . ."

[2] Mr. James H. Mann, of the District of Columbia bar, representing two Swiss citizens owning 115 shares of Chemie's stock.

are settlement negotiations.[1] (See Memo, also Tr. 131-137). The Master is of the opinion that the general question of submission of individual claims by name to this Court is too important to be decided on the meagre data now before him and as the question was not raised in the motion papers, its consideration will be deferred until a formal motion is filed and a hearing is had after notice to all parties.

WM. J. HUGHES, JR.
Special Master

July 23, 1952

1123 Filed August 8, 1952

Reply of Plaintiffs-Intervenors to First Counterclaim

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Reply to Second Counterclaim

FIRST DEFENSE

The second counterclaim fails to state a claim upon which relief can be granted.

SECOND DEFENSE

1. Plaintiffs-Intervenors are not required to reply to the first paragraph of the second counterclaim.

1124 2. Plaintiffs-Intervenors admit the averments of the second paragraph.

3. Plaintiffs-Intervenors admit that General Aniline and Film Corporation was, at the time of vesting the assets here in issue, the lawful owner of a substantial number of shares of the common stock of the plaintiff corporation, but are otherwise without knowledge or information sufficient to form a belief as to the truth of the averments of the third paragraph.

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[1] Illustrating the different viewpoints, see *Alabama Service Stations Assn.* v. *Shell Petroleum Co.*, 28 F. Supp. 386; *Tolliver* v. *Cudahy Packing Co.*, 3 F. Supp. 337, 339; see also 3 *Moore's Fed. Prac.*, p. 3474.

4. Plaintiffs-Intervenors, answering the fourth paragraph, admit that certain shares of stock of plaintiff corporation, owned by General Aniline and Film Corporation, were declared as a dividend upon the stock of General Aniline and Film in issue here, deny that the defendant McGranery or any of his predecessors as Alien Property Custodian is now or ever was the lawful owner of such shares of stock of plaintiff corporation and are otherwise without knowledge or information sufficient to form a belief as to the truth of the averments of the fourth paragraph.

5. Plaintiffs-Intervenors admit the averments of the fifth paragraph.

6. Plaintiffs-Intervenors admit the averments of the first and second sentences of the sixth paragraph, but are without knowledge or information sufficient to form a belief as to the truth of the averments of the third sentence thereof.

7, 8. Plaintiffs-Intervenors are without knowledge or information sufficient to form a belief as to the truth of the averments of the seventh and eighth paragraphs of the second counterclaim.

* * * * * *

[Signed by Counsel for Kaufman Intervenors]

1129 Filed August 14, 1952

Complaint in Intervention

The intervenor, Ernest Attenhofer, by leave of Court first hand and obtained, files this complaint in intervention for himself individually and on behalf of 554 non-enemy shareholders of plaintiff, owning 24411 shares of stock, domiciled in Switzerland, and other European countries, and on behalf of all other non-enemy shareholders who may wish to join against the above-named defendants, and alleges:

1. The principal action and the action set forth in this complaint in intervention arise under the Fifth Amendment to the Constitution of the United States of America and the Trading with the Enemy Act of October 6, 1917, as amended, (U.S.C. Title 50, Appendix, Sec. 1-38, inclusive).

2. Intervenor is a resident of 14, Fringelistr. Basle/ Switzerland, is the owner of 15 shares of plaintiff's stock, and is not, nor at any of the times herein specified or material hereto has been, an enemy or ally of
1130 an enemy of the United States of America within the meaning of such terms in the said Trading with the Enemy Act nor a national of a designated enemy country within the meaning of any law, executive or vesting order or governmental regulation.

3. Plaintiff, commonly called "Interhandel", is a corporation organized under the laws of the Confederation of Switzerland, has its principal office at Basle, Switzerland, and is and always has been a citizen of Switzerland.

4. On and prior to February 16, 1942, and continuously thereafter, plaintiff was and is the owner of 2,050,000 shares of the Common B stock and 455,624 shares of the Common A stock of General Aniline & Film Corporation, of a value in excess of One hundred million dollars ($100,000,000) and of certain other property within the United States, all as more particularly alleged in the plaintiff's complaint filed herein. On or about February 16, 1942, April 24, 1942, February 15, 1943, June 24, 1946, June 26, 1946, October 14, 1946, and February 16, 1948, defendants' predecessors issued certain vesting orders seizing the aforesaid property under the provisions of the Trading with the Enemy Act. The defendants still retain the aforesaid stock and other property without warrant of law.

5. By reason of Executive Order No. 9788, effective October 15, 1946, the predecessors of defendants received said stock and other property, including a substantial portion of the capital stock of the plaintiff paid as dividends on the stock of General Aniline & Film Corporation, and defendants now hold all of said property, as more particularly alleged in the plaintiff's complaint herein and as admitted in the answer of the defendants herein.

6. Plaintiff duly filed claims with the defendants or their predecessors, pursuant to the provisions of the Trading with the Enemy Act, for the recovery of all of said property on the ground that said seizure was illegal under the Act in that the plaintiff was not an enemy, enemy national, ally of an enemy, national of an ally of an enemy, national of any designated enemy country or a national of Germany or Japan, or in any other sense an enemy within the meaning of the Trading with the Enemy Act, as amended, and, after the denial of said claims, filed the principal action pursuant to Section 9 (a) of said Act for the return to it of said seized properties on the grounds above stated.

1131

7. The defendants in said action interposed as a defense to the recovery of said properties the claim that the plaintiff was an enemy within the meaning of the Trading with the Enemy Act, and this issue in said action is now pending before this Court.

8. Intervenor Ernest Attenhofer is, and at all times material to this complaint and prior to the vesting orders referred to in paragraph 4 hereof has been, the owner for value of 15 shares of plaintiff's stock.

9. Intervenor and those on whose behalf this intervention is brought are entitled to recover an interest in the seized assets fully described in plaintiff's complaint and defendants' answer herein, proportionate to their sharehold-

ings in plaintiff in the event that plaintiff is unsuccessful in the principal action.

10. The interests of this intervenor and the other above described non-enemy shareholders similarly situated are not or may not be adequately represented by either the plaintiff or the intervenors Kaufman; and this intervenor and other above described non-enemy shareholders similarly situated will or may be bound by the judgment in the principal action.

11. The persons constituting the class of plaintiff's non-enemy shareholders entitled under the Trading with the Enemy Act to participate proportionately in the seized assets of the plaintiff, in the event the plaintiff is unsuccessful, are so numerous as to make it impracticable to bring them all before this Court, and the character of the right sought to be enforced for said class is several, and (a) the object of the action is the adjudication of claims which do or may effect specific property involved
1132 in the action, and/or (b) there is a common question of law or fact affecting the several rights and a common relief is sought.

WHEREFORE, in the event that plaintiff is unsuccessful in the principal action, intervenor demands judgment:

1. That intervenor and the others on whose behalf this complaint is filed are entitled to the return and immediate possession of the seized assets proportionate to their shareholdings in plaintiff.

2. That the defendants, respectively, account for and deliver and transfer said proportionate share of the seized assets, together with all dividends (including stock of the plaintiff corporation) and avails thereof and increment thereon, as well as interest upon any moneys at the rate of six per centum (6%) per annum from the date of seizure, and all right, title and interest therein.

3. That intervenor and the others on whose behalf this complaint is filed have such other relief as to the Court may seem just and proper, together with the costs of this action.

HOGAN & HARTSON
By EDMUND L. JONES
HOWARD BOYD
C. FRANK REIFSNYDER
Attorneys for Intervenor
Ernest Attenhofer, et al.

Of Counsel:
/s/ DR. HANS PESTALOZZI
Dr. Hans Pestalozzi
Bahnhofstrasse 31,
Zurich, Switzerland

CONFEDERATION OF SWITZERLAND, CANTON OF BASELSTATT AND CITY OF BASEL, CONSULATE GENERAL OF THE UNITED STATES OF AMERICA, SS:

I, Ernest Attenhofer, do solemnly swear that I have read the foregoing Complaint in Intervention and know the contents thereof; and that I verily believe the statements therein made to be true.

/s/ Ernest Attenhofer
ERNEST ATTENHOFER

SWISS CONFEDERATION, CANTON AND CITY OF BASEL, CONSULATE OF THE UNITED STATES OF AMERICA, SS:

Subscribed and sworn to before me this 13th day of June, 1952.

/s/ RUDOLPH W. HEFTL
RUDOLPH W. HEFTL
Vice Consul of the United States of America, Basel, Switzerland

1136 Filed October 13, 1952

Answer to Complaint of Ernest Attenhofer, et al., In Intervention

The defendants, James P. McGranary, Attorney General of the United States and successor to the Alien Property Custodian, and Georgia Neese Clark, Treasurer of the United States, for their answer to the complaint in intervention herein, allege:

FIRST DEFENSE

Specifically answering the allegations contained in the numbered paragraphs of the complaint in intervention, defendants deny each and every allegation contained in the paragraphs of the complaint in intervention (and not merely the allegations of paragraphs or paragraphs which are in their entirety expressly denied below), except those paragraphs or allegations as are hereinafter expressly, and not by implication, admitted.

With respect to the specific paragraphs of the complaint in intervention, the defendants:

1. Admit that the principal action and the action set forth in the complaint in intervention purport to be
1137 brought and the jurisdiction of the court is invoked under the Fifth Amendment to the Constitution of the United States and the Trading with the Enemy Act, as amended (U.S.C., Tit. 50, App., Sec. 1, *et seq.*).

2. Allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 2.

3. Admit, on information and belief, that plaintiff is a corporation organized under the laws of the Confederation of Switzerland, and that it is now commonly sometimes called "Interhandel."

4. Admit that, *inter alia,* 455,624 shares of common A stock and 3,050,000 shares of common B stock of General Aniline & Film Corporation were vested by the Secretary

of the Treasury and the Alien Property Custodian under the Trading with the Enemy Act and Executive Orders and regulations issued thereunder. Said vested shares of General Aniline & Film Corporation are more particularly described in the following Vesting Orders filed with and published in the Federal Register: An unnumbered Vesting Order executed and issued by the Secretary of the Treasury on February 16, 1942 (7 F.R. 1046), Vesting Order No. 5 executed and issued by the Alien Property Custodian on April 24, 1942 (7 F.R. 3148) and Vesting Order No. 907 executed and issued by the Alien Property Custodian on February 15, 1943 (8 F.R. 2453).

Admit that the predecessors of defendant James P. McGranery executed and issued certain Vesting Orders whereby certain debts and other obligations were vested under the Trading with the Enemy Act and Executive Orders and regulations issued thereunder, and that pursuant to said Vesting Orders the predecessors of defendant James P. Granery were paid the sum of one million, seven hundred seventy-five thousand, three hundred thirty-seven dollars and fifty-six cents ($1,775,337.56). The debts and other obligations so vested are more particularly
1138 described in the following Vesting Orders filed with and published in the Federal Register: Vesting Order No. 6718 dated June 24, 1946 (11 F.R. 7643), Supplemental Vesting Order No. 6767 dated June 26, 1946 (11 F.R. 7733), Supplemental Vesting Order No. 6768 dated June 26, 1946 (11 F.R. 7733), Supplemental Vesting Order No. 6769 dated June 26, 1946 (11 F.R. 7734) executed and issued by the Alien Property Custodian and Supplemental Vesting Order No. 7874 dated October 14, 1946 (11 F.R. 13887) executed and issued by the Alien Property Custodian and amended by Amendment to Vesting Order No. 7874 dated February 16, 1948 (13 F.R. 1180) executed and issued for the Attorney General, as successor to the Alien Property Custodian, by the Director of the Office of Alien Property.

Admit that by virtue of executive Order No. 9788, dated October 14, 1946 and effective October 15, 1946, filed with and published in the Federal Register (11 F.R. 11981, error corrected 11 F.R. 12123), the Office of Alien Property Custodian was terminated and the Attorney General became the successor to the Alien Property Custodian.

Admit that pursuant to Executive Order No. 9788 the aforementioned shares of stock of General Aniline & Film Corporation were transferred to the predecessor of the defendant James P. McGranery and are now in the possession of and vested in the defendant James P. McGranery, Attorney General of the United States, as successor to the Alien Property Custodian.

Admit that pursuant to Executive Order No. 9788 the aforementioned sum of money was transferred or paid to the predecessors of defendant James P. McGranery and is now vested in defendant James P. McGranery, Attorney General of the United States, as successor to the Alien Property Custodian, and is on deposit with the defendant Georgia Neese Clark, Treasurer of the United States, in an account in the United States Treasury in the name of James P. McGranery, Attorney General of the United States, as successor to the Alien Property Custodian.

1139 Admit, on information and belief, that 2,050,000 shares of the common B stock and 455,624 shares of the common A stock of the General Aniline & Film Corporation may have a value in excess of One Hundred Million Dollars ($100,000,000).

5. Admit that by virtue of Executive Order No. 9788, dated October 14, 1946, and effective October 15, 1946, filed with and published in the Federal Register (11 F.R. 11981, error corrected 11 F.R. 12123), the Office of Alien Property Custodian was terminated and the Attorney General became the successor to the Alien Property Custodian.

Admit that pursuant to Executive Order No. 9788 the shares of stock of General Aniline & Film Corporation described in paragraph 4 hereof were transferred to the

predecessor of the defendant James P. McGranery and are now in the possession of and vested in the defendant James P. McGranery, Attorney General of the United States, as successor to the Alien Property Custodian.

Admit that pursuant to Executive Order No. 9788 the sum of money described in paragraph 4 hereof was transferred or paid to the predecessors of the defendant James P. McGranery, Attorney General of the United States, as successor to the Alien Property Custodian, and is on deposit with the defendant Georgia Neese Clark, Treasurer of the United States, in an account in the United States Treasury in the name of James P. McGranery, Attorney General of the United States, as successor to the Alien Property Custodian.

Admit the prior to the issuance of the unnumbered Vesting Order dated February 16, 1942, Vesting Order No. 5 and Vesting Order No. 907 (all more particularly described in paragraph 4 hereof), General Aniline & Film Corporation had acquired and at the time of vesting held as lawful owner 28,600 50%-paid and 56,300 100%-paid bearer shares of common stock of the plaintiff corporation.

1140 Admit that between December 1, 1944, and October 18, 1946, General Aniline & Film Corporation paid and transferred to the predecessors of defendant James P. McGranery as dividends on the vested shares of General Aniline & Film Corporation, 28,238 50%-paid and 55,610 100%-paid bearer shares of the common stock of the plaintiff corporation.

Admit that of the aforementioned shares of plaintiff corporation, 27,416 50%-paid shares and 53,984 100%-paid shares were paid and transferred as dividends on the shares of General Aniline & Film Corporation for the return of which the plaintiff has brought suit, and 822 50%-paid and 1,626 100%-paid shares were paid and transferred as dividends on 20,031 shares of common A stock of General Aniline & Film Corporation which the plaintiff does not claim.

Admit that the defendant James P. McGranery, Attorney General of the United States, as successor to the Alien Property Custodian, and his predecessors have at all times thereafter held the aforementioned shares of the plaintiff corporation as lawful owner thereof.

6. Admit that on or about February 1, 1943, the plaintiff filed with the then Office of Alien Property Custodian a document under oath, in the form required by the Alien Property Custodian, entitled "Notice of Claim for Return of Property" with respect to 455,448 shares of A stock and 2,050,000 shares of B stock of the General Aniline & Film Corporation and all dividends and increment on said shares, vested under Vesting Order No. 5.

Admit that on or about June 2, 1948, the plaintiff filed with the predecessor of the defendant James P. McGranery documents under oath, in the form required by the predecessor of the defendant James P. McGranery, entitled "Notice of Claim for Return of Property" with respect to 455,448 shares of A stock and 2,050,000 shares of B stock of the General Aniline & Film Corporation and all dividends and increment on said shares vested under
1141 Vesting Order No. 5, with respect to 176 shares of A stock of the General Aniline & Film Corporation and all dividends and increment on said shares vested under Vesting Order No. 907, and with respect to certain sums of money alleged to have been vested under Vesting Order No. 6718, Supplemental Vesting Order No. 6767, Supplemental Vesting Order No. 6768, Supplemental Vesting Order No. 6769 and Supplemental Vesting Order No. 7874, as amended.

Admit that the aforementioned claims filed by the plaintiff were disallowed by an order of the Director of the Office of Alien Property dated October 5, 1948.

Admit that the plaintiff filed its complaint in the principal action on October 21, 1948, and refer to said complaint for its contents and to the amended answer to said

complaint for admissions as to the contents of said complaint.

7. Refer to the amended answer to the plaintff's complaint for the defenses interposed and admit that the issues raised by said amended answer are now pending before this court.

8. Allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 8.

9. Deny each and every allegation contained in paragraph 9.

10. Allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations that the interests of intervenor Ernest Attenhofer and the alleged 554 stockholders of plaintiff alleged to be similarly situated are not or may not be adequately represented by either plaintiff or intervenors Kaufman.

Assert that the allegations that intervenor Ernest Attenhofer and the alleged 554 stockholders of plaintiff alleged to be similarly situated will or may be bound by the judgment in the principal action are conclusions of law and do not require an answer.

1142 To the extent that paragraph 10 of the complaint of intervenor Attenhofer, by referring to the preamble to the complaint, incorporates and alleges the statements of said preamble, allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations of said preamble with respect to the number of stockholders of plaintiff on whose behalf intervenor Attenhofer sues, their non-enemy character, the number of shares they own, and their domicile.

11. Admit that the character of the alleged right sought to be enforced by the complaint in intervention is several.

Allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegation as to the object of the action.

Admit that there may be a common question of law or fact affecting the claims asserted by the intervenors or the defenses thereto asserted by the defendants.

Admit that the intervenors allege that a common relief is sought by the complaint in intervention.

SECOND DEFENSE

The complaint in intervention fails to state a claim against defendants upon which relief can be granted.

THIRD DEFENSE

Intervenor Ernest Attenhofer and the alleged 554 stockholders of plaintiff alleged to be similarly situated have not filed notices of claim for the property now sued for within the time limit prescribed by the Trading with the Enemy Act, as amended (U.S.C., Tit. 50, App., Sec. 1, *et seq.*), particularly Section 33 thereof.

FOURTH DEFENSE

Intervenor Ernest Attenhofer and the alleged 554 stockholders of plaintiff alleged to be similarly situated have not filed a complaint within the time limit prescribed by the Trading with the Enemy Act, as amended (U.S.C., Tit. 50 App., Sec. 1, *et seq.*), particularly Section 33 thereof.

1143 COUNTERCLAIMS

For counterclaims against intervenors, defendants adopt and incorporate herein the First, Second, Third, Fourth and Fifth Counterclaims asserted against plaintiff, set out in the Amended Answer of defendants to the complaint in the principal action, filed herein January 26, 1950, and assert said First, Second, Third, Fourth, and Fifth Counterclaims against intervenor Ernest Attenhofer and against the alleged 554 stockholders of plaintiff on whose behalf the complaint in intervention is filed.

WHEREFORE:

1. defendants demand judgment dismissing the Complaint in Intervention herein, together with the costs and disbursements in the action;

2. defendants adopt and incorporate herein the prayers and demands for relief contained in the second, third, fourth, fifth and sixth prayers for relief in the Amended Answer of defendants to the complaint in the principal action, filed herein January 26, 1950, and demand judgment for said relief against intervenor Ernest Attenhofer and against the alleged 554 stockholders of plaintiff on whose behalf the complaint in intervention is filed;

3. defendants demand such other and further relief as is just and proper in the premises.

Dated: Washington, D. C. October 13, 1952

ROWLAND F. KIRKS
Assistant Attorney General
Director, Office of Alien Property
DAVID SCHWARTZ
Special Assistant to the Attorney General,
SIDNEY B. JACOBY; PAUL E. MCGRAW; and ANTHONY W. GROSS,
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Office of Alien Property
Department of Justice
Attorneys for Defendants.

Filed November 28, 1952

Transcript of Hearing Before Judge Pine

October 13, 1952

* * * * *

222 [Mr. JONES]: It seems to me that a group of stockholders representing some 25,000 stockholders with stock valued at approximately $12 million has the right

to select their own counsel and to espouse any theory that can properly be espoused in court, whether right or wrong, and Mr. Kaufman and his group of stockholders have no right to tell us you can't assert that theory, the only theory that you can assert is the theory that we have asserted, namely, that of a corporate action because if you don't assert our theory, you are cutting your own throat. Well, it is our throat and our razor and if we want to cut it, I think it is up to us to do it.

THE COURT: He says the Supreme Court requires you to do that.

Mr. JONES: Yes, and I disagree with that, if Your Honor please. In the first place, I disagree entirely with Mr. Fischer's theory of what the Supreme Court held.

Now, first, let's take the amended complaint. The amended complaint was in three counts, the first
223 count is based on a derivative stockholder's action that it is a corporate claim and that the corporation has refused to assert it and therefore the stockholder has the right to assert it. There isn't any question about that.

The second count deals with—they adopt certain of the allegations of the first count and then deal with a suggested settlement which they say would be disadvantageous to them if the parties were allowed to go through with that settlement.

And then they have a third count in which they say: Intervenors assert the claim contained in this third count on behalf of themselves and other non-enemy shareholders of plaintiff similarly situated.

Let me read that again: Intervenors assert the claim contained in this third count on behalf of themselves and other non-enemy shareholders of plaintiff similarly situated without regard to whether it may be categorized as a representative derivative or otherwise.

That is the third count, and what the Supreme Court did, they permitted that amended petition in intervention to be filed.

Now, the opinion in this case, the opinion of Mr. Justice Black, starts out by saying:

"Interhandel sued in the District Court to recover the assets. The Custodian answered alleging
224 that the Swiss corporation was dominated and controlled by officers, agent, and stockholders who were engaged in a conspiracy with German nationals and with the German Government to operate the company's business in their interests while we were at war with Germany. Petitioners, United States citizens who own stock in Interhandel, filed a motion to intervene. They admitted the Custodian's charge that Interhandel was dominated by officers and stockholders who had been engaged in such a conspiracy."

We submit, and Mr. Fischer frankly states that there is this grave hostility between the group of stockholders I represent and the group that he represents, and under those circumstances, it seems to me that that alone is enough to permit our intervention on our own behalf.

The COURT: He has retreated from that position, though, this morning.

Mr. JONES: I didn't so understand.

The COURT: Yes, he said he was perfectly satisfied to have you come in with your own counsel.

Mr. JONES: Oh, yes, I understand, provided we will assert a corporate claim.

The COURT: Yes. So I don't think that point is in the case any further.

225 Mr. JONES: The Supreme Court opinion is replete with various statements, if Your Honor please, which to me indicate that this is an individual right that the stockholders may assert. If I may, I will just read a few of the statements from the opinion.

"But such a governmental seizure requires consideration of the plight of innocent stockholders."

"Our holding is that when the Government seizes assets of a corporation organized under the laws of a neutral country, the rights of innocent stockholders to an interest in the assets proportionate to their stockholdings must be fully protected. This holding is not based on any technical concept of derivative rights appropriate to the law of corporations. It is based on the Act which enables one not an enemy as defined in Section 2 to recover any interest, right or title which he has in the property vested."

It enables one, not the corporation, it enables an individual, one who is not an enemy, to recover any right, title or interest which he has in the vested property.

"The innocent stockholder may not have title to corporate assets, but he does have an interest which Congress has indicated should not be confiscated merely because some others who have like interests are enemies."

226 And then the language which Your Honor read seems to me is perfectly clear:

"But we think the questions involved in disputes like this can be more appropriately resolved in the corporate actions authorized by Section 9(a) than by resort to a multiplicity of separate actions. In such suits the nonenemy stockholder in his own right may assert his nonenemy character in order to protect his own interest from the enemy taint caused by other stockholders."

And in that one sentence and in at least three places, they refer to his interest, his right, his own interest, and then again:

"In view of our holding that Congress has recognized that non enemy stockholders of non enemy foreign corporations have a severable interest"—as distinguished from any corporate interest—"in cor-

porate assets seized by the Custodian, it follows that the allegations of these petitioners entitle them to intervene."

Now, it seems to me, if Your Honor please, that this opinion of the Supreme Court is, as it characterized it itself in the opinion handed down the same day in the Fritz von Opel case, they said there, in view of the novel holding made today in Kaufman, we are going to reopen
227 for Fritz von Opel and allow him 30 days to assert his individual claim.

Now, where they are talking about a corporate claim, the Supreme Court holds exclusively, as Mr. Fischer would have you believe, that the only claim that could be asserted was a corporate claim. Now, there was a dissent in the Kaufman case by three Judges. It seems to me that in the discussions on this case, they must have known what the Court was deciding and in the dissenting opinion we find this language:

"The Court finds justification"—speaking of the majority opinion—"The Court finds justification for allowing a stockholder to sue in the language of Section 9; the Court says the holding 'is based on the Act which enables one not an enemy as defined in Section 2 to recover any interest, right or title which he has in the property vested.'"

Then they go on to say that there is no authority cited for that proposition but it is the ruling of the Court.

Now, there is some mention made in the opinion, which Mr. Fischer has alluded to, that these matters can be better handled in the corporate suit. Well, now, the reason for that, I take it, if Your Honor please, is this: Under the Trading With The Enemy Act, a stockholder could sue here in the District of Columbia or could sue in any district
228 in which he happened to reside. It certainly would not be good judicial administration to have as many suits as we have District Courts, where they could go into any District Court in California or Washington or

Arizona and we could have literally hundreds of suits involving this question and the rights of the stockholders all over the United States, with probably as many decisions almost, or as many shadings of decisions as there are courts. But the Supreme Court said here we have the corporation having filed an action, the appropriate way to have this matter determined in that one action is by the intervention of the stockholder who has a severable right to assert his own individual right and show that he is nonenemy or nonenemy-tainted, and it seems to me that that is a perfectly logical conclusion to reach.

THE COURT: Let me ask you, Mr. Jones, if you don't mind, why is it that you are unwilling to proceed along with them and go through the medium of recovery by the corporation on your behalf and then distribution through it? I asked the same question of your opponents and the answer I got from them was that they were afraid that the statute of limitations and the Anti-Assignment Act would preclude recovery by some or many and that it would be easier or simpler to present the claims through the corporation than individually. I couldn't quite see that, but I wonder why do you object to circumlocution, why do you want to go direct?

Mr. JONES: We want to go that way for this rea-
229 son: As Mr. Fischer has stated, there is certain friction between certain of the management group and the Kaufman group. I was employed, frankly, to bring an action on behalf of this group. What the management did, as I understand it, was this: When the Supreme Court opinion came down, recognizing the individual right of the stockholder proportionate to his interest in the seized property, they said, well, if there is that right, we never knew of it before; if there is that right, then it is our duty, as a corporation, to protect the stockholders to see that that right is properly asserted. So there was organized, and Mr. Fischer said the corporation organized at its own expense, a group to represent those stockholders to make

sure that their rights were protected and Dr. Pestalozzi was employed to represent them and he, in turn, employed us to represent them here in this country and in this suit. Now, it may be that we would go along in some respects anyway. I have been thinking, as we sat here this morning, I want to give this more consideration; it might be, well, that we might amend our intervening petition to assert in a separate count the corporate claim. There are many things that could happen, but we have got to, if Your Honor please, at some time in some way establish the cleanness, if I might say, of the stockholders, the absence of enemy taint or being an enemy.

* * * * *

232 There are many questions as to what is an innocent, clean stockholder—does he have to trace back his chain of title before the declaration of war, before the seizure, or some other appropriate date? Can he come in and say: I bought it only a few months ago on the stock exchange and I am a perfectly innocent person irrespective of where the stock came from? There are just countless numbers of problems of that kind involved in this case.

THE COURT: I still am in the dark as to why there should be this disagreement between you now that Mr. Kaufman has removed the antagonistic position that formerly was in the case. Now he says it is perfectly all right for the Attenhofer group to come in through their own counsel and without any reference whatever to them, so long as they follow the rule that we have made in the Supreme Court. I can't now see the reason for any conflict.

Mr. JONES: The conflict, if Your Honor pleases, is this: We do not think that it is clear that the Supreme Court has said that you must proceed on the theory of a corporate recovery. Suppose he is wrong and suppose we get in here and the Court says, oh, no, we didn't mean that, we said your rights were severable, you had the right to assert your individual right and you haven't done it.

THE COURT: Now, that is the position you are taking today; of course, it wasn't required to be taken before, because before there was antagonism between the two.

233

MR. JONES: That is right, but we have taken this position right along.

MR. WILSON: That is the original position.

MR. JONES: Yes, we have taken the position right along, we took it before the Master.

THE COURT: Then I have forgotten it.

MR. JONES: Yes, sir.

THE COURT: Do you think that there would be any simplification by proceeding your way rather than the other way?

MR. JONES: No, if Your Honor please, I don't think it would simplify it at all; it seems to me they are both confused. This is a very complicated matter with all these stockholders and as the Supreme Court said in its opinion, it is a novel theory, something that I don't think lawyers ever recognized existed in corporate law until that decision, it is novel, and the Supreme Court is going to find some way ultimately, I think, when they give that right not to take it away from the stockholders.

Now, it is true on this question of limitations that under the statute you had a certain time, each person had a right to file a claim, nobody recognized that they had any such claim. Mr. Fischer's group, the Schoop Reiff group, they haven't filed any claims. Have they filed any claim with the Alien Property Custodian?

234

MR. SCHWARTZ: They have not.

MR. JONES: Mr. Kaufman did file an individual claim, but as to that the Government has pleaded the statute of limitations and the anti-assignment statute.

THE COURT: Unless you are very sure of your position, don't you think it would be the part of wisdom to follow both routes?

MR. JONES: It might be very well, as I said to Your

Honor, this morning as I sat here and listened to Mr. Fischer, it might be the part of wisdom that we ought to amend our intervention petition and assert a separate count, both our own theory and the Fischer theory, so that we will have the benefit, however good it is, of both theories.

1147 Filed November 5, 1952

Reply of Attenhofer Intervenors to Counterclaim

* * * * *

Reply to Second Counterclaim

1148

FIRST DEFENSE

The second counterclaim fails to state a claim upon which relief can be granted.

SECOND DEFENSE

The Court lacks jurisdiction to entertain the second counterclaim.

THIRD DEFENSE

The defendant, James P. McGranery, is not a proper party to prosecute the second counterclaim.

FOURTH DEFENSE

1. These Intervenors are not required to reply to the first paragraph of the second counterclaim.

2. These Intervenors admit the averments of the second paragraph.

3. These Intervenors admit that General Aniline and Film Corporation was, at the time of vesting the assets here in issue, the lawful owner of a substantial number of shares of the common stock of the plaintiff corporation, but are without knowledge or information sufficient to form a belief as to the truth of the other averments of the third paragraph.

4. These Intervenors admit that certain shares of stock of plaintiff corporation, owned by General Aniline and Film Corporation, were declared as dividends upon the stock of General Aniline and Film Corporation in issue here, but deny that the defendant McGranery or any of his predecessors as Alien Property Custodian is now or ever was the lawful owner of such shares of stock of plaintiff corporation and are otherwise without knowledge or information sufficient to form a belief as to the truth of the averments of the fourth paragraph.

1149 5. These Intervenors admit the averments of the fifth paragraph.

6. These Intervenors admit the averments of the first and second sentences of the sixth paragraph, but are without knowledge or information sufficient to form a belief as to the remaining allegations of said sixth paragraph.

7, 8. These Intervenors are without knowledge or information sufficient to form a belief as to the truth of the averments of the seventh and eighth paragraphs of the second counterclaim.

* * * * *

[Signed by Counsel for Attenhofer Intervenors]

1175 Filed January 26, 1953

Opinion on Klingler Petition to File Claim by Affidavit

Annemarie Klingler, alleging she is the nonenemy owner of 20 shares of plaintiff's stock, has filed a petition for leave to file her claim herein by means of an affidavit as distinguished from a complaint in intervention. The Government and the intervenors Kaufman and Attenhofer oppose such action on the ground it does not comply with the Rules of Civil Procedure which they say require a complaint. Kaufman likewise maintains his position heretofore taken that an individual petition is not in accordance

with his view of the nature of the Supreme Court's decision in the Kaufman case.

It appears to the Master that there is no warrant of law for the assertion of a claim by affidavit. *Rule 2 FRCP* provides that there shall be one form of action to be known as "civil action" which Rule 3 provides is commenced by filing a complaint with the Court. In lieu of an initial complaint Rule 24(a) permits an intervention in an action already filed but Rule 24(c) stipulates the method, i.e., by motion which "shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought." An affidavit is not
1176 a "pleading." This was specifically held in *Tucker* v. *U. S.*, 151 U.S. 164, 168, and the entire case turned on the point. (See also 32 *Words and Phrases*, Perm. Ed. "Pleading" p. 646-647; Pocket Part 1952, p. 165-166; *Dunleer Co.* v. *Minter Homes Co.*, 33 F. Supp. 242, 243; *Brown* v. *Peters*, 94 S.W. 2nd 129, 131). *Rule 7(a) FRCP* enumerates the various pleadings; "there shall be a complaint and an answer" etc., and then states "no other pleading shall be allowed." There is no reason why the term "pleading" as used in Rule 24(c) covering intervention should have any other meaning than as limited in Rule 7(a). The term "pleading" excludes motions (*Johnson & Gould* v. *Schlitz Brewing Co.*, 28 F. Supp. 650, 651) and such things as answers to interrogatories (*Dunleer Co.* v. *Minter Co.*, 33 F. Supp. 242, 243) or a "representation of interest" (*Walker* v. *Reynolds Metals Co.*, 87 F. Supp. 283).

Apparently the requirement of Rule 24(c) relative to an accompanying pleading is strictly construed (*Kentucky Home Ins. Co.* v. *Duling*, 190 F. (2) 797, 803; *Paasche* v. *Atlas Powder Co.*, 31 F. Supp. 31, 32; *Walker* v. *Reynolds Metals Co.*, 87 F. Supp. 283; *Mullins* v. *DeSoto Securities Co.*, 2 FRD 502, 505). Merely adding the names of members of a class is not sufficient (*Kentucky Home Ins.*

Co. v. *Duling,* 190 F. (2) 797, 803); they must file a pleading stating a cause of action. (*Paasche* v. *Atlas Power Co.,* 31 F. Supp. 31, 32; *Mullins* v. *DeSoto Securities Co.,* 2 FRD 502, 505; *Babcock* v. *Town of Erlanger,* 34 F. Supp. 293, 295; *Miami County Bank* v. *Bancroft,* 121 F. (2) 921, 925-926). While it has been said that no particular formality is required in filing claims it will usually be found that such cases involve property already reduced to possession and in the hands of the court's receiver[1] (*First Trust Co.* v. *Atlas Co.,* 29 F. Supp. 1177 32, 33) which is not the case here (Master's Op. July 23, 1952). Even in such a case the Court proceeded by a pleading in intervention (*Dickinson* v. *Rinke,* 11 FR Serv. 24 C 31 Case 1 p. 489, 490, 500-502), which is the practice in Fair Labor Standards cases (*Adams* v. *Bell Aircraft Co.,* 10 FR Serv. 23 A 51, Case 1 p. 403-404; *Fowkes* v. *Dravo Corp.,* 62 F. Supp. 361, 362). These cases are similar to the present in that they involve individual rights as to which "different types of proof must be made." A case very similar to the present in this respect is *Dickinson* v. *Rinke,* 11 FR Serv. 24 C 31, Case 1 p. 489, 500-502, wherein the Court outlines the precise procedure to be followed, namely by a complaint in intervention which in that case adopted prior allegations. Intervenors in *Toebelman* v. *Missouri-Kansas Pipe Line Co.,* 7 FR Serv. 23 C 1, Case 3, p. 453, 455 and in *Innis, Speiden & Co.* v. *Food Machinery Co.,* 2 FRD 261, 262 were also allowed to adopt allegations of the main complaint. No burdensome problem of pleading would arise in the present case; the outline for such a pleading is set forth in *Clark* v. *Uebersee Finanz-Korporation,* 332 U.S. 480, 482, and the Government has conceded that new intervenors may join in either of the interventions already

[1] In *Backus* v. *Finkelstein,* 23 F. (2) 357, 366, the Court ordered funds recovered paid over to a trustee after which the distributees would file their claims. The case was decided in 1927 prior to the FRCP and followed prevailing practice in receivership cases modeled on bankruptcy practice.

filed (Tr. Jan. 5, 1953, p. 14; as to form of complaint see p. 34-35); adding of course the particular facts peculiar to the claimant.

The necessity of following the rules and the hazard of attempting any short-cut is the more striking in the present case as the claim is in effect a suit against the United States. As the Government points out (Tr. Jan. 5, 1953, p. 36-37) such a suit must strictly comply with every element of the statute, here Sec. 9a of the *Trading With the Enemy Act* (50 USCA Sec. 9a), which authorizes a suit in equity. This is now a civil action (*Rule 2 FRCP*)

which through the medium of *Rule 24(c) FRCP* may
1178 by intervention be made a part of a suit already brought. This seems a far cry from proceeding by affidavit. Also, the Government might be able to show substantial prejudice by departure from the rules. Thus no rule covers filing a counterclaim against an affidavit (See *Rule 13*) or resorting to third party practice (*Rule 14*), or pre-trying on affidavit (*Rule 16*). Also, could an affidavit support a judgment; how would it be framed? (*Rule 54*)

The last and most positive objection to following the affidavit method is the difficulty and confusion it would introduce into the matter of an appeal. As the intervenors will assert individual rights there will be individual rights of appeal, by the intervenor if he loses, by the Government if he wins. However, the right to appeal is limited to a party of record (13 Cyc. Fed. Proc. 3rd Ed. p. 297) which means rightfully of record in the way the rules provide, here by intervention under Rule 24(c). In *Hirshorn* v. *Mine Safety Appliance Co.*, 186 F. (2) 1023, the Court dismissed an appeal on the precise ground that the appellants had failed to obey Rule 24(c) as to intervention by failing to file a complaint. The absence of a party of record led our Court of Appeals in *Wolpe* v. *Poretsky*, 144 F. (2) 505, 508, to permit the litigant to intervene after

judgment in order to allow him a right of appeal. Similar leniency was shown in entertaining the appeal of a non-party in *West* v. *RKO Co.*, 70 F. (2) 621, 623. However, there is no assurance that in the present case the Court would extend such relief. In *Mullins* v. *DeSoto Securities Co.*, 6 FR Serv. 24 a.2 Case 3 the Court denied it. Good sense thus suggests the matter should be put beyond any question of doubt and as early in the proceedings as possible.

1179 I conclude therefore that in fairness to all, including the claimants, the only safe course is for them to file complaints in intervention. An entire group may join in one such complaint which may refer to the allegations of one of the interventions now on file and merely supplement them by such additional statements covering the particular applicant as may be needed. Such additional complaints in intervention need not under Rule 5(a) FRCP be served on all other such claimants but only upon the Government and such other parties, if any, as may under the rule be "affected thereby."

WM. J. HUGHES, JR.
Special Master

January 22, 1953

1185 Filed February 4, 1953

Opinion on Objections to Defendants' Interrogatories

Kaufman's Claim That His Adherents Are Not Parties:

The Government has propounded interrogatories to each of the intervenors "on whose behalf" Kaufman and Attenhoefer have filed their complaints in intervention.[1]

[1] This is the wording adopted by the Government in the first paragraph of each set of interrogatories. Kaufman, of course, asserts he sues derivatively for the corporation and not for any given set of individuals (Tr. Jan. 26, pp. 5-15, 20-25).

In general, these interrogatories are designed to obtain the name, address and nationality of each individual stockholder, the circumstances of the acquisition of the stock and its pedigree, with particular reference to possible enemy taint. Both Kaufman and Attenhoefer feel the interrogatories are too broad, but Kaufman makes the additional contention that under *Rule 33 FRCP* the interrogatories can only be addressed to parties. Kaufman asserts that his intervention is a corporate derivative claim and that the stockholders who would be bene-
1186 fited by his intervention (Tr. Jan. 7/53, p. 36, 46) are not before the court as parties. Hence, Kaufman claims the interrogatories should be limited to information, not privileged, available to Kaufman alone.[1] (Kaufman, Obj. to Defs. Interrogs., par. 1-4; Tr. Jan. 7/53, pp. 35-43, 46-53). Attenhoefer admits he acts for the direct benefit of his group but thinks the interrogatories are premature (Tr. Jan. 26/53, pp. 42, 64). He states that if Kaufman's adherents are not now parties, neither are Attenhoefer's (Tr. Jan. 26/53, p. 39). However, he has no objection to the persons in his group being made parties at this time provided those in the Kaufman group are likewise so required (Tr. Jan. 26/53, p. 66). It is necessary at the outset to examine the validity of Kaufman's position that the stockholders who support his type of intervention (Tr. Jan. 26/53, pp. 23, 46)[2] are not at present parties to the action and hence are immune to questioning by the Government's interrogatories. If they are not now parties, the further question arises as to whether they may be made parties, even, if necessary, involuntary parties plaintiff.

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[1] For convenience, Kaufman is referred to in the singular; his wife, Aenni C. Kaufman, has recently died, and no substitution has been made.

[2] Kaufman, altho he sues for "all other similarly situated", says he asks no relief for any individual stockholder (Tr. Jan. 26/53, p. 20) and disclaims representing any individual (Tr. Jan. 26/53, p. 22). He says *all* stockholders would benefit from his intervention (Tr. Jan/26/53, p. 27).

Kaufman's Amended Complaint states he files it on behalf of himself and all stockholders of plaintiff similarly situated (See Amended Complaint; also Tr. Jan. 26/53, p. 20). There is a certain anomaly, therefore, in concluding such persons are not parties, bearing in mind
1187 the courts have recognized the possibility of one being a party and still not filing a pleading or actively participating in a trial (*6 Cyc. Fed. Proc. (3rd Ed.)*, p. 382; *McKay* v. *Rogers*, 82 F. (2) 795, 798). However, the general rules of practice ordinarily require that parties must be named. "Parties to an action, in the eye of the law, are those only who are named as such in the record, and are properly served with process or enter their appearance" (6 Cyc. Fed. Proc. (3rd Ed.), p. 384; cf. p. 382). Adopting the test of whether persons other than Kaufman would be bound by the outcome of Kaufman's claim, it seems clear they would not be so bound, bearing in mind the individual nature of the right as held by the Supreme Court.[1] (*Kaufman* v. *Societe*, etc., 96 L. Ed. 522; see also Opinion of Master, July 23, 1952). In the present type of intervention, unnamed claimants are not, therefore, bound by the allegation that the intervenor acts for himself and all others similarly situated; such claimants are not foreclosed unless they individually appear (*Albrecht* v. *Bauman*, 130 F. (2) 452, 454-455; cf. *Penn. Co.* v. *Deckert*, 123 F. (2) 979, 984). As the Supreme Court said, "in such suits the nonenemy stockholder in his own right may assert his nonenemy character in order to protect his own interest" (*Kaufman*

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[1] Kaufman appears to think otherwise (Tr. Jan. 26/53, pp. 47-48, 52-A, 60) but his reasons are not persuasive in view of the Supreme Court's emphasis on the individual nature of the right (See Tr. Jan. 26/53, pp. 35-38). Kaufman's insistence that his suit is derivative and that he will show nonenemy taint by way of "proof" instead of via parties (Tr. Jan. 26/53, pp. 13-15, 30) would hardly, after the proof was in and if he lost, lead a court to bar out his one-time adherents. The exact nature of the right, as declared by the Supreme Court, is too doubtful (cf. *Pentland* v. *Dravo Corp.*, 152 F. (2) 851).

v. *Societe,* 343 U.S. 156, 161). Likewise by the test
1188 of appealable interest, it seems clear that unnamed claimants would have no right of appeal, such right being limited to named parties (*U. S.* v. *Seigel,* 83 App. D. C. 88, 90; 168 F. (2) 143, 144-145; *West* v. *RKO Co.,* 70 F. (2) 621, 623-624; *Rule 73(a) FRCP;* cf. *Cohen* v. *Young,* 127 F. (2) 721). Intervenors, in general, have rights of appeal only after they become parties. (13 Cyc. Fed. Proc. (3rd Ed.), p. 306). It follows that Kaufman's adherents are not now parties to the present suit and are therefore outside the scope of *Rule 33 FRCP* permitting interrogatories to parties. The same conclusion must be reached as to the individual Attenhoefer claimants.

Should Kaufman's Adherents and the Attenhoefer Group Be Made Parties?

The fact that Kaufman's adherents and the Attenhoefer claimants are not now parties does not conclude the matter. The record before the Master has shown the desirability of nonenemy stockholders advising the Government of the general nature of their claims at this time rather than later; only in this way will an avalanche of fact questions be avoided at the end of the case, in the event Chemie loses. Also, as the Government points out, individual disclosures may have an evidentiary bearing on the main case itself (Tr. Jan. 7/53, p. 13). If so, the Government ought to be allowed to obtain such information directly, from the stockholder, instead of through the spokesman of a group. It does not seem reasonable that the Government's avenues of inquiry should be limited to what Kaufman knows, or Attenhoefer. Nor should the information be limited to such information as Kaufman,
let us say, is able to give in the form of an affidavit
1189 signed by Kaufman alone. The same is true as to Attenhoefer. The protection of an individual oath supporting each claimant's position would in the latter event be lost to the Government. Also, so far as Kaufman

is concerned, he by no means admits any duty to answer with particularity for all; he limits his obligation to respond to what he himself knows of his own knowledge (Tr. Jan. 7/53, p. 38-43; cf. Kaufman Objections to Interrogs., par. 4). Attenhoefer no doubt takes the same position. It thus appears that the Government might not receive the same quantum or grade of information via Kaufman or Attenhoefer as it would if the individual stockholders were compelled to respond.

Likewise, the Supreme Court opinion in *Kaufman* v. *Societe, supra,* has a bearing on the present problem. It is difficult to read that opinion without feeling that the Court contemplated the individual stockholders would sooner or later become parties-intervenors. The Court disclaims any holding based on technical concepts of derivative stockholders' rights and stresses throughout the overriding intention of Congress to protect innocent individual stockholders.[1] The Court states their rights may be asserted in the corporate actions authorized by Sec. 9(a) of the Act rather than by a multiplicity of separate actions and continues:

> "In such suits the non-enemy stockholder *in his own right* may assert his non-enemy character . . ." (Italics added)

1190 This holding followed by the statement that "Courts trying such corporate actions have adequate equitable power and procedural flexibility to protect all interests . . ." incline the Master to the belief that as absence of individual enemy taint is the essence of the stockholders' case it is not beyond the powers of the courts to require non-enemy stockholders who would be benefited by the two interventions to enter their appearance as parties. There is no problem of legal theory in the case of Attenhoefer's group; he admits he acts for their direct

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[1] See the Government's summation of the individual nature of the Supreme Court's concept at Tr. Jan. 26/53, pp. 35-38.

individual benefit. But even in the case of Kaufman, such appearance would in no way violate the concept of a derivative class action; it is well known that in such suits individual beneficiaries of the decision eventually come in to show the extent of their claims.[1] In the present case each claim, even if asserted as Kaufman wishes by way of evidence without making the nonenemy stockholders parties, must in the end produce a decision on the nonenemy status of each individual stockholder. This points to the stockholder being required to become a party not only for convenience in asserting and ruling upon his claim but to preserve his rights of appeal. Likewise, the claimant's appearance as a party would insure him opportunity to be heard in the event of settlement or compromise proposals.[2] (*3 Moore's Fed. Prac.* 2nd Ed., pp. 3551-3560).

1191 From the viewpoint of the Government the intervention of nonenemy stockholders as parties seems not only desirable for reasons already given but almost essential. Unless, for example, the Kaufman adherents appear as parties they would not be bound by a judgment for or against Kaufman. (*3 Moore's Fed. Prac.* 2nd Ed., pp. 3465-3467; *Kaufman* v. *Societe,* 343 U.S. 156; *York* v. *Guaranty Trust Co.,* 143 F. (2) 503, 528-529, rev.'d. on other grounds 326 U.S. 99; *Oppenheimer* v. *Young Co.,* 144 F. (2) 387, 390; *cf. Hansberry* v. *Lee,* 3111 U.S. 32, 41-46). Hence a decision as to Kaufman's derivative suit

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[1] *Cf. Alabama Service Station Assn.* v. *Shell Co.,* 28 F. Supp. 386, 390; *3 Moore's Fed. Prac.* p. 3474; *Oppenheimer* v. *Young Co.,* 144 F. (2) 387, 390. The present is not a case similar to *Tolliver* v. *Cudahy Packing Co.,* 39 F. Supp. 337, wherein the decision of a single paramount question was decisive as to every one. The essence of the present case under the Supreme Court's decision is that each nonenemy stockholder stands or falls according to the circumstances of his own particular case.

[2] Kaufman suggests that if he makes his proof and obtains a corporate judgment, the proceeds may be distributed by a plan to be submitted to the court for approval. (Tr. Jan. 26/53, pp. 16-19, 29) This might possibly be feasible but certainly it is not the only method.

would amount to a mere partial or piece-meal disposition of the case. The present adherents to Kaufman's theory, unnamed of record, might turn right around and file individual complaints, pointing to the Supreme Court opinion as the precise authority for their action. As to Attenhoefer's group, they too are not of record and could come in singly from day to day after decision in the main case, or even by filing separate suits.[1] This would be contrary to the spirit of the *Federal Rules of Civil Procedure* which contemplate wherever possible a complete disposition of the controversy in one proceeding. (Rules 1, 14, 18, 19, 20, 23, 24 FRCP, *3 Cyc. Fed. Prac.* 3rd Ed., p. 226; *cf. Shields* v. *Barrow*, 17 How. 130, 136). As the Court said in *Brotherhood of Locomotive Engineers* v. *C.M. & St. P.R.R. Co.*, 34 F. Supp. 594, 596:

> "The new rules should have a liberal construction, and one of the objects sought by these rules was to avoid a multiplicity of suits. All related controversies should, as far as possible, be settled in one action."

1192 *Rule 21 FRCP* provides:

> "Parties may be dropped or added by order of the Court on motion of any party *or of its own initiative* at any stage of the action and on such terms as are just."

In *3 Moore's Fed. Prac.*, 2nd Ed., p. 2906, it is stated:

> "The Rule, permissive in character, also gives the Court discretion to allow necessary (conditionally necessary) parties or proper parties to be added at any stage, on such terms as are just."

"Necessary parties" is here used in the technical sense of *Shields* v. *Barrow*, 17 How. 130, 136, i.e. necessary to

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[1] Subject, of course, to possible Governmental objection on the ground of the Statute of Limitations, laches, etc.

a complete disposition of the case. (*Cf. 3 Moore's Fed. Prac.*, 2nd Ed., p. 2150).

While the rule and its predecessors have been chiefly utilized in solving problems of jurisdiction and venue it has not been limited to such cases. In *Adams* v. *Bell Aircraft Corp.*, 10 F.R. Serv. 23a 51 Case 1, the Court cited it as authority for adding, on motion long after suit was filed, 171 additional parties plaintiff in a class suit brought for "all others similarly situated." To the same effect is *Culver* v. *Bell & Loffland*, 146 F. (2) 29, 31, *Pentland* v. *Dravo Corp.*, 152 F. (2) 851 and *Tennessee Coal & Iron Co.* v. *Muscoda Local*, 5 F.R.D. 174, 176-177.[1] In *Fowkes* v. *Dravo Corp.*, 62 F. Supp. 361, 362, the defendant moved to compel those "similarly situated" to appear as parties plaintiff. As here no common questions of law or
1193 fact existed as between these claimants but each stood in his individual fact pattern. The Court ordered them to appear as parties or have their claims barred.

Possible Involuntary Joinder Under Rule 19(a) FRCP:

Rule 19(a) FRCP provides:

> "Necessary Joinder. Subject to the provisions of Rule 23 and of subdivision (b) of this rule, persons having a joint interest shall be made parties and be joined on the same side as plaintiffs or defendants. When a person who should join as a plaintiff refuses to do so, he may be made a defendant or, in proper cases, an involuntary plaintiff."

It may be conceded that nonenemy stockholders have no "joint interest" nor is it entirely accurate to say even as

[1] Kaufman has criticized many of these cases as being "spurious" class suits (Tr. Jan. 26/53, pp. 48-50, 56-57). However, it is by no means certain that Kaufman's intervention is a "true" class action, bearing in mind the Supreme Court opinion. See the difficulties exemplified in *Pentland* v. *Dravo Corp.*, *supra*.

to Kaufman's adherents that they definitely refuse to join as parties plaintiff. Their intention is apparently to stand on the side-lines for the present, "waiting for the smoke to settle," as their counsel stated. (Tr. Jan. 7/53, p. 40). This is in accord with what appears to be the European reluctance to enter litigation by name if it can be avoided. Unfortunately, however, the compelling reasons already cited prevent deference to this viewpoint or the Attenhoefer group's apparent diffidence.[1] If necessary to a complete disposition of the case, the nonenemy stockholders, if their names can be ascertained, can be made involuntary parties plaintiff as the rule allows. While Rule 19(a) is based upon *Independent Wireless Telegraph Co.* v. *Radio Corporation,* 269 U.S. 459, which held a licensee had a substantive right to have the patent owner join as an involuntary party plaintiff in an infringement suit, there is nothing in the rule limiting it to this type of case. Indeed it has been applied to cases of mere refusal or reluctance similar to the present (*Slauson* v. *Standard Oil Co.,* 29 F. Supp. 497, 498; *Davis* v. *Oberle-Jordre Co.,* 9 F.R.D. 301; *Koepp* v. *Northwest Freight Lines,* 10 F.R.D. 524, 527; *cf. Pettit* v. *Pheman Co.,* 3 F.R. Serv. 19b 2 Case 1).[1]

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In addition to the above there is authority, where the claimants are capable of being served, as here by publication, to make them parties defendant if necessary.[2] (See

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[1] After joinder as parties, the nonenemy stockholders would, of course, have certain compensating advantages, such as right to notice, rights of appeal, etc.

[1] The theory of these cases is criticized in a *Commentary, 4 F.R. Serv.* 23a 22, p. 908. It is also said the involuntary plaintiff rule has thus far been applied only in patent cases (*6 Cyc. Fed. Prac.* 3rd Ed., p. 476; *3 Moore's Fed. Prac.,* pp. 2149-2150). The latter states, however, "An extension of the doctrine of the cases which have sanctioned involuntary joinder is warranted." (*Moore, op. cit.,* p. 2150).

[2] Such an alignment, however, would seem unnatural and violative of the doctrine of such cases as *Lee* v. *Lehigh Valley Coal Co.,* 267 U.S. 542, *Indianapolis* v. *Chase National Bank,* 314 U.S. 63, etc. However, see *Dental Precision Co.* v. *Caulk Co.,* 7 F.R.D. 203, as to later re-alignment.

Com. 4 F. R. Serv. 19a 22, p. 908; *3 Moore's Fed. Prac.*, 2nd Ed., p. 2147).

It would seem therefore that the courts have power, with or without a fund in its possession—and here it has none, to require the ultimate beneficiaries of a class action to enter their appearance as parties where the interests of justice so require. Under the Supreme Court's decision in the Kaufman case, nonenemy stockholders could undoubtedly require the Court to admit them as individual parties. What the stockholders can do, the courts can do, if necessary, in the administration of justice. These stockholders, after all, are theoretically already before the Court through the action of their spokesman in suing for himself "and all others
1195 similarly situated." Some of them may rely on the Kaufman complaint to toll the statute of limitations or escape the defense of laches.[1] (Cf. *York* v. *Guaranty Trust Co.*, 143 F. (2) 503, 528, 529 and cases cited). To require the disclosure of their names and the entry of their appearance does not appear to be an extreme instance of the exercise of judicial power, or oppressive in any way.[2] Separate pleadings are unnecessary; an entire group may join in one or other of the complaints in intervention already filed and be represented by the same attorney. (*Adams* v. *Bell Aircraft Co.*, 10 F.R. Serv. 23a 51 Case 1; *Fowkes* v. *Dravo Corp.*, 62 F. Supp. 361; *Rule 20 FRCP*).

Finally, Kaufman need have no fear that requiring his adherents to appear will divest his complaint of its derivative nature (Tr. Jan. 26/53, pp. 23-25, 52-54, 61-62).

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[1] Under his derivative theory, Kaufman contends the statute of limitations is tolled by the main suit (Tr. Jan. 26/53, pp. 10-11, 21).

[2] The Government feels it would be impracticable and unsatisfactory to examine these stockholders as witnesses under Rule 31 FRCP (Tr. Jan. 26/53, pp. 32-33) instead of as parties under Rule 33. Under Rule 31, there is no requirement that the witness must answer, and no sanction if he refuses. Also the method is cumbersome, somewhat akin to the procedure on letters rogatory (See Rule 31(b), Rule 30(c) and (e) FRCP).

Nothing in the Rules of Civil Procedure prevents multiple parties plaintiff from joining in a true class suit, as Kaufman contends his is. Such a joinder by the Kaufman adherents in no way commits them to Attenhoefer's theory of direct assertion of individual rights. Kaufman and his adherents can litigate on the Kaufman theory, and the Attenhoefer group on the Attenhoefer theory.

The present holding does not force claimants to
1196 adopt either theory. All that is held is that, for what appear to be sound reasons of judicial administration, the adherents to both groups shall come in as parties now, rather than later. Only in this way can the case proceed in an orderly fashion and the Government's rights of discovery be rendered effective. (*Cf. Alabama Ind. Serv. Station Assn.* v. *Shell Co.*, 28 F. Supp. 386, 390).

My conclusion is therefore that upon application of the Government[1] an order may be entered directing all non-enemy stockholders for whose ultimate benefit complaints in intervention have already been filed to join in one or other of these complaints or file complaints of their own.[2] Any future claimant should follow the same course. The Government may then address a new set of interrogatories, modified as hereinafter provided, to each such party as and when he becomes of record.

Modification of Interrogatories:

It appears to the Master that a somewhat simplified set of interrogatories might serve all useful purposes at

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[1] The Government has not yet expressed its attitude (See Tr. Jan. 26/58, pp. 38, 44, 59, 63).

[2] In *Brooks* v. *Southern Dairies, Inc.*, 38 F. Supp. 588, a Fair Labor Standards case, it was held beyond the power of Congress to require other employees to become parties. In *Pentland* v. *Dravo Corp.*, 152 F. (2) 851, 855, the Court refused to agree with this holding. Whatever the merits of it in Fair Labor Standards cases, it has no application here to a derivative stockholders' suit against the United States.

this time, bearing in mind that additional interrogatories may later be propounded if needed (Rule 33). The Government is certainly entitled to know the full name and address of each claimant, his nationality, occupation, the number of shares he owns, or his precise interest therein, when and where the stock was acquired and in what way, by purchase, gift, devise, exchange, operation of law or otherwise. As to prior holders, there is no
1197 objection to asking the claimant about them, if he knows, without however placing upon the claimant any duty to investigate (See Tr. Jan. 7/53, pp. 9-16). In the event the claimant knows the identity of a prior holder or holders, he may likewise be asked the identity and nationality of such predecessors, their residence, occupation, etc. It is reasonable, too, that the Government should be entitled to know if any loans, pledges or other agreements have been made upon the stock, and the dates and persons involved, and their nationalities. Whether the shares have been voted, when, and by whom, and the proxies, seems also a reasonable question.

I do not regard questions as to the claimant's other stock-holdings as proper, certainly not at this time, nor the identity of the claimant's present or prior employers unless such questions are limited to whether any prior employer was of enemy character. Whether the claimant's stock or other assets have been blocked or the claimant or his spouse blacklisted since April 1940 and the details thereof seems an entirely proper inquiry and this may be asked as to any prior holder of his stock, if he knows.

Counsel for the parties should attempt to agree on the form of the interrogatories as above modified in default of which a further order will be entered.

WM. J. HUGHES, JR.
Special Master

January 31, 1953

1199 Filed March 3, 1953

Amendment to Complaint in Intervention

SECOND COUNT

1. Intervenors Attenhofer, et al., with leave of Court first had and obtained, file this Second Count to its original Complaint in Intervention, adopting and incorporating herein all pertinent allegations of said original Complaint.

2. Pursuant to and in accordance with the Opinion of the Supreme Court of the United States in the case of *Kaufman, et al., Petitioners,* v. *Societe Internationale, etc., et al., Respondents,* 343 U. S. 156, in a derivative capacity and on behalf of the plaintiff, intervenors sue the defendants herein to recover for the benefit of those stockholders who are "non-enemy" within the purview of the American Trading with the Enemy Act such portion of its vested properties as is proportionate to the interests of such stockholders in the plaintiff corporation.

WHEREFORE, the premises considered, these Intervenors Attenhofer, et al., demand judgment against the defendants for the return of such portion of its assets as is proportionate to the interests of its "non-enemy" stockholders in the plaintiff corporation, such return to be for the benefit of such stockholders and in accordance
1200 with the aforesaid decision of the Supreme Court and said intervenors demand such other and further relief in the premises as to the Court may seem just and proper.

HOGAN & HARTSON

By EDMUND L. JONES
Edmund L. Jones

/s/ PAUL R. CONNOLLY

/s/ C. FRANK REIFSNYDER
Attorneys for Intervenors
Ernest Attenhofer, et al.,

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1201 Filed April 1, 1953

Answer to Amendment to Complaint of Ernest Attenhofer, et al., in Intervention

The defendants, Herbert Brownell, Jr., Attorney General of the United States, and successor to the Alien Property Custodian, and Ivy Baker Priest, Treasurer of the United States, for their answer to the Second Count contained in the amendment of complaint in intervention herein and in amendment to their answer to the original complaint in intervention, allege all allegations, defenses, counterclaims, and prayers in their said answer to the original complaint in intervention, and further allege as follows:

1. Defendants admit that Intervenors Attenhofer, et al., filed said Second Count to its original Complaint in Intervention, in amendment of said Complaint, with leave of Court first had and obtained.

1202 2. Defendants admit that intervenors allege that pursuant to and in accordance with the Opinion of the Supreme Court of the United States in the case of *Kaufman, et al., Petitioners* v. *Societe Internationale, etc., et al., Respondents*, 343 U.S. 156, in a derivative capacity and on behalf of the plaintiff, intervenors sue the defendants herein to recover for the benefit of those stockholders who are "non-enemy" within the purview of the American Trading with the Enemy Act such portion of its vested properties as is proportionate to the interests of such stockholders in the plaintiff corporation.

WHEREFORE, defendants pray now as they did in their answer to the original complaint in intervention of Ernest Attenhofer, et al.

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Attorneys for Defendants.

Dated: Washington, D.C.,
April 1, 1953.

1230 Filed July 21, 1953

Opinion Denying Stay and Holding Individual Claimants Must Appear

The application of Ernest Attenhoefer for a stay of all proceedings until determination of whether plaintiff's action is to be dismissed pursuant to Chief Judge Laws' opinion of February 19, 1953 is denied. Such dismissal may or may not occur; if it did occur, there would no doubt be an appeal. The remainder of the case should not—certainly as to joinder of parties and discovery—remain inactive for an indefinite and protracted period.

As to whether individual claimants who are not now parties to the present action should be required to appear and state their claims, this matter has already been considered in the Master's opinion dated January 31, 1953 on Objections to Defendants' Interrogatories. The nature of the individual claimants' rights under *Kaufman* v. *Societe*, 343 U.S. 156, was likewise considered in an opinion dated June 23, 1952 on the Motion of Ernest Attenhofer for Leave to Intervene. Both these opinions are made part of the present opinion by reference. They hold:

(1) Bearing in mind the individual nature of the right, as held in *Kaufman* v. *Societe, supra*, there is nothing to compel individual claimants to assert their claims through the Kaufman or any other intervention. 1231 They are entitled to assert their claims individually through counsel of their own choice or can join as they wish any present or future intervention.

(2) An individual claimant who does not appear by name is not before the court as a party. For this reason and because of the individual nature of the right as held in *Kaufman* v. *Societe, supra*, and the fact that he stands or falls according to the facts and circumstances in his own particular case, an unnamed claimant would not be bound by any decision in Kaufman's or any other intervention.

(3) As a party each claimant will secure the court's attention to his individual case as it deserves, unaffected by any other case. Only as a party will the claimant, or conversely, the Government, be able to appeal the particular decision without intermingling it with some other decision. Likewise, if a party, a claimant would have important rights of notice of possible settlement or change in the nature of the litigation.

(4) Only as a party will the Government be able to obtain discovery from individual claimants. Under *Rule 33 FRCP* interrogatories can be addressed only to *parties*.

The Government seems entitled to have the oath of a *party* in answer to its interrogatories, as distinguished from the oath of Kaufman, let us say, or Attenhofer or any other intervenor purporting to act for others. Further, the Government should be able to obtain first-hand as distinguished from second-hand information. Likewise a present intervenor has repudiated any duty to investigate to obtain information with which to answer Government interrogatories. Also unless a foreign claimant is a party his deposition cannot be taken under *Rule 26* as there are no subpoena powers abroad; the only recourse would be letters rogatory, which would be ineffective due to the multitude of persons and fact questions involved.

(5) The Supreme Court's opinion in *Kaufman* v. *Societe, supra,* appears to contemplate individual claimants should become parties sooner or later.

1232 (6) Only by making the individual claimants parties can there be a complete disposition of the present controversy.

(7) A court or a master under *Rule 21 FRCP* has power to add parties where necessary.

(8) Orderly litigation points to individual claimants being made parties now rather than later. Only in this way will an avalanche of fact questions be avoided at the end of the case. The general nature of each individual claim should be disclosed reasonably in advance in order that the Government may make proper preparations for trial.

I am therefore of the opinion that individual claimants should, within a reasonable time, come in as parties plaintiff either as intervenors in their own right or by joining in one or other of the interventions already of record. This ruling in no way changes the derivative nature of the Kaufman intervention. Claimants may join in that intervention on the Kaufman theory, or file individual claims

in intervention, as they see fit. The intent of this ruling is to preserve to Kaufman and his adherents the right to proceed on his theory unimpaired; the sole requirement is that such claimants shall appear as parties by name within the period fixed; otherwise their stock shall be excluded from consideration on Kaufman's derivative theory. Complaints in intervention filed pursuant hereto may be filed without a motion for leave to intervene or order allowing the intervention; objections heretofore made by any party are noted and preserved.

As to the time within which such individual claims must be filed, I fix the period up to and including January 1, 1954, a date easily remembered and affording, I feel, ample time. There are many indications that the Kaufman decision as to the rights of individual claimants is already well known both here and abroad. The requirement of the order herein that notice shall be given by advertisement in newspapers here and in Switzerland should also assist in publicizing the period fixed. There is, finally,
the fact that self-interest will normally result in
1233 a stockholder keeping track of his property and thus
he will become aware of the filing period.

In the event individual claimants do not file their claims within the period fixed, the order herein provides they shall be forever barred insofar as the present suit is concerned. Only in this way can the date fixed be made effective.

The present ruling deals only with the present action and is without prejudice to the right, if any, of claimants to file separate actions in which to assert their claims if they so desire.

An order is attached hereto putting the above decision into effect.

WM. J. HUGHES, JR.
Special Master

July 21, 1953

1234 Filed July 21, 1953

Order

It appearing that

(1) Societe Internationale Pour Participations Industrielles et Commerciales S.A. (also known as Internationale Industrie- & Handelsbeteiligungen A.G.); and formerly named Internationale Gesellschaft Fuer Chemische Unternehmungen A.G. (I. G. Chemie) and Societe Internationale Pour Entreprises Chimiques S.A. (I. G. Chemie), a corporation of Basle, Switzerland, otherwise known as I. G. Chemie and as Interhandel, has brought an action against the defendants under Section 9(a) of the Trading with the Enemy Act, 40 Stat. 411, as amended, 50 U.S. Code App. § 1 *et seq.*; and

(2) said action seeks the return of shares in General Aniline & Film Corporation and other property, vested by the Alien Property Custodian under said Trading with the Enemy Act; and

(3) Eric G. Kaufman and Aenni C. Kaufman, 802 West 190th Street, New York, New York, are intervenor-plaintiffs and have filed a derivative stockholders' complaint in intervention in this action, as non-enemy stockholders in the plaintiff corporation, individually and as general guardians of the persons and property of Emil Gert Kaufman and Ruth Mirjam Kaufman, and on behalf of all stockholders of plaintiff corporation similarly situated; and

1235 (4) Schoop, Reiff & Co., Pelikanstrasse 9, Zurich, Switzerland, is a Protective Committee which represented, as of June 26, 1952, 190 allegedly nonenemy stockholders, allegedly owning 17,268 ordinary shares in the plaintiff, and which has accepted and recognized the complaint in intervention of said intervenor-plaintiffs Kaufman as pleading the claims of said 190 stockholders and all others similarly situated; and

(5) said 190 stockholders appear to be stockholders of plaintiff allegedly similarly situated to intervenors Kaufman and may intend to intervene herein, or to join in, or to benefit from, the said complaint in intervention; and

(6) Ernest Attenhofer, 14 Fringelistrasse, Basle, Switzerland, is an intervenor-plaintiff and has filed a complaint in intervention in this action for himself individually; all others similarly situated; on behalf of 554 allegedly nonenemy shareholders of plaintiff domiciled in Switzerland and other European countries, allegedly owning 24,411 shares of stock, and on behalf of all other nonenemy shareholders who may wish to join in said complaint in intervention against the defendants; and

(7) authorizations from said 554 allegedly nonenemy stockholders to represent them in the prosecution of their claims as allegedly nonenemy stockholders have been received, as of June 13, 1952, by Dr. Hans Pestalozzi, Bahnhofstrasse 31, Zurich, Switzerland; and

(8) said 554 allegedly nonenemy stockholders appear to be stockholders of plaintiff allegedly similarly situated to intervenor Attenhofer and may intend to intervene herein, or to join in, or to benefit from, the said complaint in intervention; and

(9) Annamarie Ruth Klingler, Box No. 23, Rexburg, Idaho, has filed a petition for leave to file an affidavit in this action alleging that she is a nonenemy and the owner of 20 shares of plaintiff corporation, which petition was denied on January 26, 1953, without prejudice; and

1236 (10) a motion was filed herein on July 8, 1952 on behalf of said Annamarie Ruth Klingler and of Hugo Schmidli, for leave to file a brief as *amici curiae* regarding the intervention of said Ernest Attenhofer, and in support thereof an affidavit was filed alleging that Hugo Schmidli, Goldwondstrasse 11, Ennetbaden, Switzerland, is a non-

enemy and the owner of 95 shares of plaintiff corporation; and

(11) said Annamarie Ruth Klingler later filed a motion for leave to intervene by filing a complaint herein on behalf of herself and all others similarly situated; and said Hugo Schmidli may intend to intervene herein, or to join in, or to benefit from, one of said complaints in intervention; and

(12) other stockholders than those referred to above may also believe themselves to be nonenemy stockholders and may intend to intervene herein, or to join in, or to benefit from, one of said complaints in intervention; and

(13) the decision of the Supreme Court in this case, *Kaufman* v. *Societe Internationale, etc.*, 343 U.S. 156, contemplates that nonenemy stockholders in plaintiff corporation may intervene in this action; and

(14) proceedings had in this case demonstrate the necessity, in the interest of the orderly administration of justice, that such of the stockholders in the plaintiff corporation as claim to be nonenemies and intend to intervene herein, or to join in, or to benefit from, one of said complaints in intervention, should intervene within a prescribed time, rather than without limit as to time, and that jurisdiction exists for the entry of an order requiring such appearances; and

(15) an order requiring the appearance and intervention, within a prescribed time, of such allegedly nonenemy stockholders, is in accordance with the Federal Rules of Civil Procedure and the fundamental principle thereof that wherever possible a complete disposition of a controversy be had in one proceeding; and

1237 (16) defendants are entitled to the benefit, in orderly fashion, of prescribed pre-trial procedures

with respect to such allegedly nonenemy stockholders, and such procedures should reach such stockholders directly; and

(17) this case can be brought to a conclusion within a reasonable period of time and in an orderly fashion only if such allegedly nonenemy stockholders as intend to intervene herein, or to join in, or to benefit from, one of said complaints in intervention, appear and intervene within a prescribed period of time; and

(18) without the entry of the present order, confusion and disorder will ensue in the litigation of this case, to the detriment of the administration of justice and the rights of the parties, and that this order is made in the exercise of the "equitable power and procedural flexibility" referred to in the said decision of the Supreme Court.

NOW, THEREFORE, IT IS ORDERED THAT

(A) the following stockholders in the plaintiff:

(i) the 190 stockholders in the plaintiff and the 554 stockholders in the plaintiff described above,

(ii) any other stockholders in the plaintiff who, since June 26, 1952, may have joined the said Protective Committee of Schoop, Reiff & Co., or who, since June 13, 1952, may have authorized the said Dr. Hans Pestalozzi to represent them in the prosecution of their claims as allegedly nonenemy stockholders in the plaintiff,

(iii) said Annamarie Ruth Klingler and said Hugo Schmidli shall, and

(iv) all other stockholders in the plaintiff, who intend to intervene herein, or to join in, or to benefit from, one of said complaints in intervention, shall, during the period from the date hereof up to and in-

cluding January 1, 1954, cause their appearances to
1238 be entered in this action as intervenor-plaintiffs, in such manner as they are advised; and in the event they do not so appear within the said period, they shall thereafter be barred from appearance or intervention in the present action, and from any benefit from (a) any of said complaints in intervention now pending, (b) similar complaints which may hereafter be filed, and (c) any judgment which may be made in the present action with respect to rights or interests of nonenemy stockholders in the plaintiff corporation.

(B) The provisions of this order shall be without prejudice to the right, if any, of stockholders in the plaintiff corporation to institute a suit or suits separate and distinct from the present action. The present order is likewise without prejudice to the right of Kaufman to assert claims for himself and all others similarly situated based upon a derivative theory of recovery, the sole requirement being that such persons shall intervene as parties by name, within the period prescribed.

(C) Service of this order will be made in the following manner:

(i) the defendants, in addition to serving this order upon all parties of record, shall, within one week of the date of this order, make service of a copy of this order by registered mail, postage prepaid, upon said Protective Committee, in care of Schoop, Reiff & Co., Pelikanstrasse 6, Zurich, Switzerland, upon Dr. Hans Pestalozzi, Bahnhofstrasse 31, Zurich, Switzerland, upon Annamarie Ruth Klingler, Box No. 23, Rexburg, Idaho, and upon Hugo Schmidli, Goldwandstrasse 11, Ennetbaden, Switzerland;

(ii) defendants will cause the publication of a copy of this order as an advertisement, once a week for

three consecutive weeks, beginning within one month of the date of this order, and during the first week of each calendar month thereafter for four months, in a newspaper of general circulation in Basle and Zurich, Switzerland, in a newspaper of general circulation in Washington, D. C., and in the Washington Law
1239 Reporter. Such advertisement will have a caption reading in large type "I. G. CHEMIE (INTERHANDEL)" and a sub-caption reading "Re Stockholders in Societe Internationale Pour Participations Industrielles et Commerciales S.A. (also known as Internationale Industrie- & Handelsbeteiligungen A.G.); and formerly named Internationale Gesellschaft Fuer Chemische Unternehmungen A.G. (I. G. Chemie) and Societe Internationale Pour Entreprises Chimiques S. A. (I. G. Chemie), a corporation, address: Basle, Switzerland, otherwise known as I. G. Chemie and as Interhandel". Defendants will, within six weeks from the date of this order, serve a copy of one of such advertisements in one of said newspapers by registered mail, postage prepaid, upon said Protective Committee, in care of Schoop, Reiff & Co., Pelikanstrasse 6, Zurich, Switzerland, upon Dr. Hans Pestalozzi, Bahnhofstrasse 31, Zurich, Switzerland, upon Annamarie Ruth Klingler, Box No. 23, Rexburg, Idaho, and upon Hugo Schmidli, Goldwandstrasse 11, Ennetbaden, Switzerland.

(iii) Defendants will file an affidavit, or affidavits, showing service in conformity with the requirements of this order.

(D) This order shall have no effect upon the freedom of choice of counsel by stockholders who may cause their appearances to be entered. They may be represented by counsel for present complainants in intervention or they may be represented by other counsel of their own choice.

Individual stockholders or groups of stockholders may join as co-plaintiffs in one of the complaints in intervention now pending or they may file separate complaints in intervention. A separate complaint in intervention may set out the claim in full or refer to and incorporate the allegations of one of the complaints in intervention now on file and supplement such allegations with such additional allegations respecting the particular stockholder or stockholders as may be needed. Appearances and additional com-
1240 plaints in intervention need not be served on all intervenors, but only upon the defendants and such other parties, if any, as may under Rule 5(a) of the Federal Rules of Civil Procedure be "affected thereby".

WM. J. HUGHES, JR.,
Special Master

July 21, 1953

1242 Filed August 27, 1953

Motion of Intervenor Ernest Attenhofer to Vacate the Order of the Special Master of July 21, 1953, Setting a Date Barring Further Interventions

Comes now the intervenor, Ernest Attenhofer, individually and on behalf of 554 shareholders of the plaintiff corporation holding 24411 shares, and all other shareholders similarly situated, and moves the Court to vacate the Order of the Special Master of July 21, 1953, which requires that all non-enemy shareholders of the plaintiff corporation become named parties of record in this cause before January 1, 1954, or be thereafter barred from participating in any judgment in this action or
1243 otherwise asserting any claim in this action, and for reasons therefor states that the Order is unlawful and beyond the authority of the Special Master, as

more fully appears in the attached Memorandum of Points and Authorities.

HOGAN & HARTSON

By /s/ .....
EDMUND L. JONES

/s/ .....
PAUL R. CONNOLLY

/s/ .....
C. FRANK REIFSNYDER
810 Colorado Building
Washington 5, D. C.,
Attorneys for Intervenors,
Ernest Attenhofer, et al.

Of Counsel:

DR. HANS PESTALOZZI,
31 Bahnhofstrasse,
Zurich, Switzerland.

1292 Filed December 16, 1953

Order

Upon consideration of intervenor Attenhofer's motion, filed herein August 27, 1953, to vacate the order of the Special Master of July 21, 1953, upon consideration of all the papers filed by the parties, upon motions made in open Court, and after hearing counsel for the parties in the action, and upon the proceedings had herein, it is, by the Court,

1. ORDERED that said motion be and it hereby is denied.

And upon the further motion of intervenor Attenhofer, made in open Court on December 10, 1953, to extend the date set forth in paragraph (A)(iv) of said order of the Special Master, it is further

1293 2. ORDERED that said motion be and it hereby is granted, and the said order of the Special Master of July 21, 1953, is hereby amended by striking therefrom the words "January 1, 1954", in paragraph (A)(iv) thereof, and inserting in lieu of said words the words "March 31, 1954";

And, upon the further motion of defendants made in open Court on December 10, 1953, it is further

3. ORDERED that defendants will cause the publication of a copy of the order of the Special Master, as herein amended, as an advertisement, once during each of the first three weeks of January, 1954, once during the first week of February, 1954, and once during the first week of March, 1954, in the publications specified in paragraph (C)(ii) of the said order of the Special Master of July 21, 1953; further, that at the foot of the said copy so published there appear the words "As Amended by Order of the United States District Court for the District of Columbia, dated December 16, 1953"; and, further, that no other or further notice of the present order need be given by defendants.

December 16, 1953

DAVID A. PINE
Judge

Filed April 4, 1957

Transcript of Hearing Before Special Master

December 29, 1953

* * * * * * * * * * *

482 Mr. Jones: Now, in the hearing on June 17th, it was pointed out to the Master that we were in the same situation as the Kaufman group, because we had also a derivative theory in the second count of our complaint in intervention, the difference between the Attenhofer group

and the Kaufman group being that Attenhofer was proceeding on a double-barreled theory, namely, on the derivative theory and also on the individual theory, it being our position that it was not entirely clear what the Supreme Court meant in its opinion in the Kaufman case.

I received yesterday a letter from counsel in Switzerland advising that they had been advised that the Schoop-Reiff group—that is the group supporting the Kaufman intervention—had announced its intention to, by advertisement and otherwise, start a campaign seeking to enlist the participation of more Interhandel stockholders in their group. In support of this campaign, they point out that they are in a far better position than the other intervenors because they are specifically named in paragraph (B) of the Order of July 21, 1953, whereas the Attenhofer and the Curator groups, or any other groups, are not mentioned by name, and that that entitles them to some preferential treatment.

The Schoop-Reiff group also contends in this campaign
483 that they have launched or are about to launch that the Attenhofer and Curator groups do not have the same rights as the Kaufman group to proceed on the derivative theory, as I have said, because they are not mentioned, and they point out that because they are not mentioned it may be that their action on the derivative theory is no longer valid because of lapse of time.

* * * * * * * * * *

486 Mr. Sher: Mr. Jones makes the statement that he would like to have the parties put on equality. If your Honor is going to try to put the intervening groups on an equality, if that is the purpose of this, then it seems to me that there are a number of other things that have to be considered here. For example, the Attenhofer group is a management-sponsored group. In order to finance the costs of this litigation, the Schoop-Reiff group is requiring each person who adheres to that group to pay a small sum

per share for deferring the expenses of the litigation. The expenses of the Attenhofer group are all being paid by the management. If the purpose is to put the parties on an equality, that should be considered.

It seems to me, too, that the Attenhofer group has one other very large advantage over the other groups. Being a management-sponsored group, they have, we are fairly certain, access to the stockholders lists of the corporation from time to time, which the other groups do not have.

What I am getting at is that I don't think there is anything that you can do that is going to put all three groups on an equality, and I am sure that from time to time statements will be made by each of the groups that some other group isn't going to like. That is more or less inevitable when three or more groups of stockholders are out trying to get more people to join their groups, and I don't think you can take care of that or eliminate
487 that possibility by anything that you can do.

Filed April 4, 1957

Transcript of Hearing Before Special Master

August 12, 1954

* * * * * * * * * * *

509 Mr. Sher: May it please the Court, this is a motion by the Kaufman group of intervenors for an extension of time in which to file answers to the interrogatories.

Since the Master's order was entered in April, this development has taken place. The so-called Dirksen bill providing for the return of all alien property to the former owners was introduced in the Senate and committee hearings were held. The Senate Judiciary Committee reported it out favorably. And there was a lot of gossip around to the effect that the bill might pass on the unanimous consent calendar.

Now, all of this was widely publicized in the press in Europe and particularly in the press in Switzerland. And a great many people believed that all the litigation over alien property would end as a result of this legislation, and that there was no point in their spending any time or any money in pursuing the litigation any further.

One of the people who seemed to be as much affected by this publicity as anyone else was Mr. Gut, who is the head of Schoop, Reiff and Company, which is the group that is heading up the committee that we represent.

Mr. Gut, feeling very strongly that not much was to be gained by pressing the litigation any further, got out a circular to the members of the Kaufman group of
510 intervenors, a copy of which I am submitting to the Master as Exhibit 1, dated June 14, in which he in effect advised the stockholders that it did not make much difference whether they filed the answers to the interrogatories or not because the chances were very strong that legislation would make the litigation moot.

We did not share these views, and so advised Mr. Gut, and urged him to get out a circular to the stockholders telling them that it was important that they should answer the interrogatories. There was considerable correspondence between us, and a number of overseas telephone calls, and as a result, Mr. Gut got out a second circular, dated July 2, in which he advised the stockholders that counsel in the case felt that the answers should be filed, otherwise the stockholders ran the risk of being dismissed from the case.

The Master: Do you wish to make that a part of the record?

Mr. Sher: Yes, I would like to make that second circular a part of the record.

The Master: When you speak of counsel, do you refer to American counsel?

Mr. Sher: Yes, American counsel, Graubard and Moskovitz and ourselves.

Now, that second circular did go out on July 2. And as a result of that, 208 stockholders filed answers to the interrogatories by July 27.

511 The Master: And how many more remain to be filed?

Mr. Sher: Now, there are 213 who have not answered. The 208 who have answered hold a total of 15,713 shares. The 213 who have not answered hold a total of 5,584 shares.

The Master: So they are relatively smaller stockholders.

Mr. Sher: They are relatively smaller stockholders.

Now, I am convinced that a great many of these people who have not answered failed to answer because of the confusion that was created by these two conflicting circulars, and by the failure of Mr. Gut to get the circular out earlier than he did, to get the circular out urging them to answer earlier than he did.

I think it is not fair to these smaller stockholders to have them out of the case if in fact they failed to answer because of this confusion.

Now, of course, it could be that I am wrong about it and that none of them will come in with answers.

The Master: Now, just one second, Mr. Sher. You say that some of them may not come in with answers or none of them may. Do you mean by that that they would simply abandon their claim?

Mr. Sher: Well, it is conceivable that they may all have sold their stock in the meantime and have no more interest in the litigation. I don't think that is true, however. In my own mind, I am convinced that a large percentage

512 of them did not answer because of the confusion. And they ought to be given an opportunity to answer with a full understanding of what the situation really is.

Filed April 4, 1957

Exhibits to Transcript of Hearing Before Special Master

August 12, 1954

* * * * * * * * * * *

534 EXHIBIT 1

Translation

Schoop, Reiff & Co. 14th June, 1954
Aktiengesellschaft

Zurich .....

To the Participants in our Protective
Action relating to Interhandel.

With our circular of 10th February a.c. and the enclosures to this we reported to you on the course of the meeting of the common shareholders which was organized by us on 9th February a.c.

With the circular of 2nd March a.c. we advised you to join the suit as individual intervenors and on 1st April a.c. we informed you of the success of this recommendation.

Today we have to make the following report to you:

I. In accordance with the instructions given us, inter alia, in the resolution of the meeting of 9th February a.c., we have endeavored to win over the competent Federal authorities for an intervention in the sense of obtaining the suspension of all suits until the settlement negotiations aimed at have possibly led to their goal. Minister Dr. Stucki, the delegate of the Federal Council for Special Missions entrusted with the conduct of the matter by the Federal Political Department later informed us that no possibility is seen in Berne of becoming active in the matter in any way before all private law remedies in the U.S.A. have finally been exhausted. The good services of the Swiss Association of Bankers which we hoped for were refused because the Interhandel administration attached con-
535 ditions to the cooperation with the existing protective

committees under the leadership of the Association of Bankers and these were unacceptable because of the serious prejudice to our well known legal standpoint.

On 27th April a.c. the Special Master appointed by the District Court handed down a decision saying that on the basis of the entry into the suit within a period of 90 days, i.e. *by 27th July a.c.*, the interrogatories which you know about must be completed, sworn to on oath before the competent American consul in Switzerland and then 'filed'. This 'filing' has to take place as we are informed by our American lawyers, at the Office of Alien Property, there being no necessity that the interrogatories will immediately become court exhibits.

II. *The Special Master Decided as Follows about the Formalities for Filing the Interrogatories:*

a) All stockholders who already completed and signed the interrogatory in December 1953, and swore to it before the American consul do not have to complete a new interrogatory if the facts have not changed since the date of completion until today. However, these already existing interrogatories must be authenticated *once more* by the American consul and then filed by us, through our American lawyers, not later than 27th July a.c.

b) Contrary to the arrangement in December of last year, on the other hand, stockholders with holdings of up to 10 shares also have to swear to their *short* interrogatories before the American consul and have them filed punctually by us as under lit. a.).

536

c) Stockholders who have not yet completed any interrogatory at all have to complete the *long* interrogatory irrespective of the number of shares they own and therefore proceed according to lit. a.).

III. *We Inform You as Follows of Our View of the Present Situation and Our Recommendations:*

1) With regard to the order of the Special Master under discussion, we find ourselves faced with a completely changed state of affairs compared with that of December of last year. At that time, as you know, it was a matter of avoiding the immediate entry into the suit by completing the interrogatories, which transaction was approved by the competent court. You know that this was then abruptly stopped upon the one-sided request of the U. S. Justice Department (that is, our opponents in the suit) at the moment when the latter had to recognize the success of the interrogatory action and the entry into the suit was thus made inevitable.

2) If, now, on the basis of the entry into the suit which has taken place, the completion of interrogatories is immediately demanded once more, the question of the desirability of complying with such a demand at the present moment must be considered, from our point of view, in a fundamentally different manner. On the basis of our successful derivative theory of intervention (see the decision of the U. S. Supreme Court of 7th April, 1952), the Inter-
537 handel stockholders have entered a *contingent* suit which *must* and *can* only be carried through if Interhandel should finally lose its main suit before the court of last instance and if no previous settlement between the main parties to the suit or by state intervention based on a general release of the 'enemy property' vested in the U.S.A. should render the litigation immaterial.

Any procedural move at present by the stockholders who have intervened as a precaution, whether it is instigated by a lower court or by the later possible opponent, must be described as nothing other than an absurdity.

3) Then we also gave our American lawyers very definite instructions to appeal against the order of the Special Master with the aim of deferring all further litigation, and especially the filing of the interrogatories, until this may have some practical and legal sense after termination of

the main suit. We also gave such instructions in the case that it is finally necessary to reckon with the dismissal of all possible legal remedies. Here we are proceeding from the consideration and conviction that any order to be feared from the District Court dismissing the intervenors because of non-compliance with court orders could *then* be quashed by higher courts if our practical litigation on the basis of the decision of 7th April, 1952, should ever become necessary.

Whether our American attornies believe they can comply with these instructions or whether they will object to them on special and decisive grounds of procedural tactics,
538 we do not yet know. But even if they believe that they cannot answer for an appeal against the Special Master's interrogatory order, we are of the opinion that in practice not even the failure to file the interrogatories at that time could make any decisive difference either:

a.) in the later title to sue of the individual stockholder on the basis of his punctual entry into the suit as derivative intervenor in the suit,

nor

b.) in the commercial value of his stock holding in view of the settlement out of court of the current litigation which is to be anticipated. Naturally, this judgment involves considerations of the highest importance. In weighing all the circumstances here we can only express our opinion and are naturally not able to accept any responsibility for this ourselves.

4) We therefore advise you, to the best of our ability, but without any liablity on our part, as follows:

a.) stockholders who have no hesitation about the publication at that time of the facts which will become more or less public property through the completion of the interrogatories should proceed as under Fig. II, lit. a—c and inform us of their willingness to do this *not later than*

25th June a.c., whereupon we shall furnish them with the corresponding material;

b.) stockholders who wish to delay completing the interrogatories until it is established that the intervention
539 suits *must*, in fact, be proceeded with, should inform us of this by 10th July a.c., whereupon the matter will rest there until further notice in accordance with our considerations outlined above, based on the entry into the suit;

c.) for stockholders who have joined our action and who do not give us any instructions within the said terms, we shall assume that they have decided in favor of possibility b.).

5) Finally, we do not want to omit remarking that in our considerations above we have been guided—naturally without liability—by the conviction that the whole dispute will in the not all too distant future be satisfactorily eliminated by the success of the demands for legislation at present before the competent American forums (Senate and House of Representatives) which aim at a general release of vested 'enemy property' on certain comprehensible conditions. It can scarcely be overlooked that our actions hitherto have helped to create *one* condition for this. If we did not report earlier about this matter, the main reason for this was that in view of the recommendations to be made to you we wanted to follow in as much detail as possible and wait for the development of the pending and very marked efforts for release which are happily being made by the Americans.

Yours truly,

SCHOOP, REIFF & Co.
AKTIENGESELLSCHAFT

sig. GUT sig. REIFF

540 EXHIBIT 2

(Translation From German)

SCHOOP, REIFF & CO., INC., CIRCULAR OF JULY 2, 1954

July 2, 1954

TO THE PARTICIPANTS IN OUR INTERHANDEL PROTECTIVE ACTION

Since the issuance of our last circular of June 14, 1954, we have received (on June 28, 1954) a letter from our New York attorneys, dated June 24th. The letter indicates that our attorneys roundly deny any possibility of effecting any immediate postponement of the intervention suits until the main Interhandel litigation has been concluded. Similarly, they state that it is impossible to resort to any legal means of attacking the Special Master's ruling that the interrogatories be filed by July 27, 1954, so as to effect delay. Expressly warning of the danger that failure to meet that deadline might result in dismissal of the statement of intervention as parties to the litigation, they urgently call upon us to recommend that you file the filled-out interrogatories most emphatically.

We are unable to abandon the standpoint set forth in the June 14th circular: that such procedure and the fixing of such a date are incomprehensible, at a time when no one can know whether the intervention suits will ever be actually brought to trial. It is all the harder for us to modify this standpoint of ours in view of the fact that the cited June 24th letter from our attorneys states that the Special Master, in reply to a question, expressly refused to rule as to the eventual consequences of failure to meet the
541 deadline, *i.e.*, whether that would possibly involve subsequent exclusion from the suit. But now that our attorneys demand that the interrogatories be filled out and filed in time with such urgency, our own sense of responsibility leads us to transmit this insistent request

to you. In the light of this state of affairs, each participant in our protective action *must decide for himself* whether he wishes to assume a litigation risk by failing to file an interrogatory, with a view to the well-known endeavors now under way in the United States Senate and House of Representatives for the annulment of all sequestrations of so-called enemy property, or intends to fill it out in time.

The interrogatories, duly filled out in conformity with Par. II of the June 14th circular, would have to reach us by July 19th at the latest, so that we could forward them in time.

Very truly yours,

SCHOOP, REIFF & CO., INC.

/L.S./ GUT /L.S./ SIGNATURE

1616 Filed September 24, 1954

Defendants' Motion Under Federal Rule 37(d) to Dismiss the Complaints of Intervening Stockholders for Failure to Answer Interrogatories

The defendants by their undersigned attorneys move the Court for an order under Federal Rule 37(d) dismissing the complaints of the intervenor-plaintiffs listed in Exhibit A.

The ground of this motion is that the said inter-
1617 venors have failed to serve answers to the interrogatories served upon them by defendants.

Respectfully submitted,

[Signed by counsel for Defendants]

September 23, 1954

1618 **Memorandum in Support of Defendants' Motion Under Federal Rule 37(d) for an Order Dismissing the Complaints of Intervenor-Plaintiffs for Failure to Answer Interrogatories**

The plaintiff-intervenors whose names are listed in Exhibit A have failed to answer interrogatories served upon them by defendants, though almost six months' time has been allowed. The interrogatories were served on April 2 and April 8, 1954, respectively, i.e., April 2 on the shareholders belonging to the Kaufman group and April 8 on those belonging to the Attenhofer and Klingler groups.

In the circumstances dismissal of their complaints
1619 is warranted under Federal Rule 37(d).

For almost two years the stockholders have known, through their committees and counsel, that defendants were seeking the information to be elicited by the present interrogatories. On October 17, 1952 defendants first served interrogatories designed to elicit the facts of the status of the individual stockholders. The result, after much discussion, was the order of the Special Master, July 21, 1953, setting a bar date for the intervention of stockholders. Throughout, before and especially after the bar date was set, it was emphasized that the stockholders would have to answer interrogatories.

The form of the interrogatories as now propounded was worked out by the parties under the supervision of the Special Master at the hearing of November 6, 1953, when the parties were planning on voluntary answers by the stockholders. Judge Pine approved the interrogatories on November 9, 1953. The plan of voluntary answers was thereafter abandoned and the bar date reinstated by the Court's order of December 21, 1953. Again, the defendants and the Court made it clear that after intervention the

stockholders would be required to answer the inter-
1620 rogatories. (Proceedings before Judge Pine, December 7 and 10, 1953, pp. 7, 8 and 49.) In addition, on January 29, 1954, defendants by letter informed counsel

of all three groups of intervenors that as soon as interventions were to take place, defendants would serve each intervening stockholder with the interrogatories approved by Judge Pine. This was for the purpose of minimizing any postponements of the time to answer interrogatories, *after* intervention.

Following the intervention by the stockholders on March 31, 1954, the bar date under the Court's order of December 21, 1953, defendants immediately, on April 2 and 8, 1954, served each intervenor with a set of the interrogatories previously approved. The interrogatories called for answers within thirty days. Upon motion of the intervenors, the Master, at the hearing of April 27, 1954, granted an extension of ninety days from the date of hearing, viz., until July 27, 1954, a total of about 115 days from service. On July 23, 1954, the Kaufman group moved for a further extension, and the Master, by order of August 13, 1954, extended until September 15, 1954 the time within which all intervening shareholders shall answer defendants' interrogatories, a total of five and a half months from service of the interrogatories, and almost two years from the beginning of the affair.

The necessity for answering the interrogatories is, of course a matter of law. But the necessity, and the sanctions for failure to observe the law, were explicitly called to the attention of counsel. In his order of August 13, the Special Master specified:

1621 "2. In so far as plaintiff intervenors Kaufman, et al., are concerned, the present extension of time is conditioned upon counsel for the said plaintiff intervenors advising any and all intervenors represented by them who have not yet answered defendants' interrogatories, that such interrogatories must be answered on or before September 15, 1954, and that in default of answers to the said interrogatories, the Master, upon motion of the defendants, and good cause therefor being shown,

will enter an order dismissing the claims of the said intervenors."

Counsel for both the Attenhofer and the Klingler group have impressed upon the individual members of their groups the absolute necessity for answering. Mr. Jones, counsel for the Attenhofer group, so stated expressly at the hearing before the Special Master of August 12 (Tr. p. 19). The Swiss Protective Committee of the Klingler group first addressed personal letters to each of the members in default and the American counsel thereafter impressed upon the Swiss Protective Committee the necessity for prompt action prior to the extended deadline. (See Stipulation with the Klingler group extending time for answering the interrogatories, August 6 attached hereto as Exhibit B.) And we understand that the committee for the Kaufman group mailed to each of the members a copy of the quoted order of the Master of August 13.

The plaintiff-intervenors who are still in default have had time in generous abundance, notice repeatedly and even solicitous urging to answer. They have deliberated and for reasons of their own have determined not to answer. In the circumstances they cannot be thought of as simple folk who do not know their rights and obligations, or who have not been sufficiently advised. They are rather plaintiffs who do not wish to prosecute their suits or who have deliberately refused to answer, appreciative of the sanction and indifferent to a dismissal. Their complaints must therefore be dismissed in the interest of orderly proceedings. The Court opened its doors to all of them but only on condition they prove their claim and abide by its rules and orders. They cannot be allowed to clog up the Court's processes and to burden the defendants, if the case is to be brought to a conclusion within a reasonable time.

1622.

Respectfully submitted,

[Signed by counsel for Defendants]

September 23, 1954

1666 Filed October 13, 1954

City of Zurich, Canton of Zurich, Confederation of Switzerland, ss.:

Hans Gut, being duly sworn, deposes and says:

I am Managing Director of Schoop, Reiff & Co.

On August 20th 1954, I sent to each of the persons named in the list annexed hereto as Exhibit A, a copy of the order of William J. Hughes, Jr., dated August 13, 1954, together with a circular dated August 20, 1954, copy of which is annexed hereto as Exhibit B.

The persons named in Exhibit A hereto, are those intervenors who had not yet answered the defendants' interrogatories, and the circular annexed hereto as Exhibit B advises them that such interrogatories must be an-
1667 swered on or before September 15, 1954, on pain of dismissal of the claim of those intervenors not filing interrogatories by that date.

HANS GUT

Confederation of Switzerland, Canton and City of Zurich, Consulate General of the United States of America, SS:

Subscribed and sworn to by HANS GUT, before me a Vice-Consul of the United States of America in and for the consular District of Zurich, Switzerland, duly commissioned and qualified, this 5th day of October 1954.

/s/ M. Hassman

MARGARET HUSSMAN
Vice Consul of the United States of America at Zurich, Switzerland

Service No. 1504
No fee prescribed
TARIF ITEM 38

SEAL

1680 Filed November 16, 1954

Opinion on Motion to Dismiss for Failure to Answer Interrogatories

On August 13, 1954 the Special Master entered an order extending the time within which claimants must answer interrogatories until September 15, 1954. In that order it was indicated that the Master upon motion and a showing of good cause would enter an order dismissing the claims of those failing to answer within the prescribed period. On September 24, 1954 the Government filed such a motion and a hearing has been had on objections thereto.

For the reasons hereinafter stated the Master is of the opinion that the Government's motion must be granted.

The present matter has a long history dating as far back as October 17, 1952, over two years ago. On that date the Government first served interrogatories seeking facts as to the status of individual stockholders. After hearings the Master rendered an opinion dated January 31, 1953 followed by an order dated July 21, 1953 requiring stockholders on whatever theory they were seeking
1681 recovery and however represented to appear by name. One of the purposes of this requirement was to effectuate the Government's discovery rights with particular reference to its right to have its interrogatories answered personally by the stockholders as distinguished from obtaining the information secondhand from the stockholders' representative (See Opinions of Master dated January 31 and July 21, 1953 and Order dated July 21, 1953, par. 16). The Master's opinion of January 31, 1953 was filed after hearing objections filed by the Kaufman intervenors November 24, 1952 and the Attenhofer intervenors November 20, 1952. Likewise the Master's order of July 21, 1953 was entered after hearing the Government's motion filed April 16, 1953 that certain stockholders be required to appear by name within a stated time and objections thereto and after hearing the Attenhofer intervenors' motion filed May 27, 1953, for a stay of all proceedings

pending final determination of the validity of the dismissal of Chemie's suit pursuant to Chief Judge Laws' opinion of February 19, 1953. It is a fair statement therefore that representatives of the Kaufman and Attenhofer groups were aware from October 1952 onward that the Government was seeking information of individual stockholders by way of interrogatories to be answered by each such stockholder. Subsequent intervenors would naturally be on similar notice.

The order of the Master dated July 21, 1953 above referred to fixed a bar date of December 31, 1953 within which individual stockholders must come in by name and assert their claims. It was without prejudice to the right, if any, of such stockholders to file separate suits if they so desired; however no such suits have been filed (Master's Order of July 21, 1953, par. 18(B)). A motion addressed to
1682 the Court (not the Master) to vacate this order on the ground it was beyond the authority of the Master was filed by the Attenhoffer intervenors on August 27, 1953, with notice to the Kaufman and Klingler intervenors. This resulted in a hearing before the Court (Judge Pine) on November 5, 1953 at which the matter of interrogatories to stockholders was extensively discussed, resulting in the Court directing the parties to appear before the Master to have the form of the interrogatories settled. This was done at a hearing before the Master on November 6, 1953 after which the parties reappeared before Judge Pine on November 9, 1953. On that date the parties agreed on a voluntary basis to attempt to obtain answers to the interrogatories and the Court fixed December 31, 1953 as the date on which the answers were to be filed (Tr. Nov. 9, 1953, pp. 6, 12). The parties again appeared before Judge Pine on December 7 and 10, 1953, at which time the Government advised the Court of Chief Judge Laws' memorandum opinion of November 16, 1953 indicating he would grant the Government's motion to dismiss Chemie's main suit. This, the Government stated,

materially changed the situation as to the claims of stockholders and required that they be made parties instead of being allowed to answer interrogatories on a voluntary basis. The Government therefore pressed its contention that the stockholders be made parties and answer the interrogatories in that capacity and for a bar date for appearances (Tr. Dec. 7 and 10, 1953, pp. 4-9; 20, 31, 55-64). The Court (Judge Pine) so held and by order dated December 16, 1953 fixed March 31, 1954 as the bar date (Tr. Dec. 7 and 10, 1953, pp. 66-67; 72). On that date some 2500 stockholders intervened by name.

1683 The order of the Master dated July 21, 1953 which required stockholders to intervene by name required the Government to serve it upon all intervenors of record and this was done. It likewise required publication in Zurich and Basle newspapers and in Washington, D. C. newspapers once a week for three consecutive weeks and once a month thereafter for four months. This was done. The Master's order of July 21, 1953 gave as one of the grounds therefore the following:

> "(16) defendants are entitled to the benefit, in orderly fashion, of prescribed pre-trial procedures with respect to such allegedly non-enemy stockholders, and such procedures should reach such stockholders directly".

This referred to the Government's right to propound interrogatories directly to the stockholders and it is clear from the pre-history of the order that counsel for all parties so understood it.

Judge Pine's order of December 16, 1953 which extended the bar date until March 31, 1954 provided for republication of the Master's order of July 21, 1953 (with the new bar date) in the same publications in Switzerland and in this country and this was done.

Upon the intervention by name of the intervening stockholders on March 31, 1954 the Government on April 2 and

April 8, 1954 served counsel with interrogatories addressed to each such stockholder. On April 12, 1954 counsel for the stockholders which included the Kaufman, Attenhofer and Klingler groups of intervenors filed objections to the interrogatories in certain respects and asked an additional 90-day extension of time for answering the interrogatories. The latter was particularly opposed by the Government which invited the attention of counsel for the stock-
1684 holders to its letter of January 29, 1954 putting them on notice that as the interrogatories had been brought to the attention of opposing counsel and had been approved by the Court as far back as November 1953, the Government would oppose any extension of the period for answering the interrogatories as provided in Rule 33 *FRCP*.

The stockholders' objections and their request for a further extension of time were heard by the Master on April 27, 1954. The Master granted a three-months' extension of time to expire July 27, 1954, within which the answers were to be filed (Tr. Apr. 27, 1954, p. 136). Thereafter on July 23, 1954 the attorneys for the Kaufman group of intervenors moved for a further 90-day extension. The Government opposed this and a hearing was had on the motion August 12, 1954 at which time counsel for the Attenhofer group joined in the motion. The result was that the Master by order dated August 13, 1954 granted all intervening parties a further extension of time to answer the Government's interrogatories, the time to expire at 11:59 P.M. September 15, 1954. Because of the peculiar circumstances of the Kaufman group the order provided:

> "2. In so far as intervenors Kaufman, et al. are concerned, the present extension of time is conditioned upon counsel for the said plaintiff intervenors advising any and all intervenors represented by them who have not yet answered defendants' interrogatories, that such interrogatories must be answered on or before September 15, 1954, and that in default of answers to the said interrogatories, the Master, upon motion of the

defendants, and good cause therefor being shown, will enter an order dismissing the claims of the said intervenors."

The latter statement while addressed to the Kaufman group was, of course, notice to all.

1685 . The defendants, as already seen, on September 24 last filed their motion to dismiss the complaints of stockholders who failed to answer defendants' interrogatories. On this a hearing was had before the Master on October 13, 1954 at which time the intervenors' opposition was asserted. Their principal grounds were that Rule 37(d) permits dismissal only in the event the failure to answer is wilful and that the non-receipt of answers is not a sufficient basis from which to infer wilfulness (Tr. Oct. 13, pp. 13-19, 30, 33, 42, 44-46). Counsel for the intervening stockholders likewise suggested that many of them had sold their stock in the interim, which, counsel stated, raised the question of the right of the vendees to be substituted under Rule 25(c) *FRCP* (Tr. Oct. 13, 1954, pp. 22, 33-38). Counsel for one group of stockholders suggested the Master should enter an order, if he thought it appropriate, that the vendees be substituted as intervening parties plaintiff under Rule 25(c) *FRCP* (Tr. Oct. 13, 1954, p. 34). Counsel for another group felt the proper order would be one stopping this side of dismissal but providing that no intervening stockholder failing to answer interrrogatories could proceed further without the express permission of the Court (Tr. Oct. 13, 1954, pp. 17-18).

The Master is unable to accede to any of these suggestions. Taking the last two first it seems quite clear that the Master has no power, without a motion under Rule 25(c) *FRCP*, to interject new intervenors into this litigation. Even with a motion the question would arise as to whether there was any right of substitution in view of the provisions of the *Anti-Assignment Statute* (31 *U.S.C.* Sec. 203) prohibiting assignment of claims against the United

States. The matter is not now before the Master and is expressly left undecided either way.

1686 As to the second suggestion that the complaints of non-answering stockholders be retained for further possible action if, as and when they should answer *in futuro,* the Master feels that such action would amount to a denial of the Government's right to sanctions under Rule 37(d).

Coming to the main question, Rule 37(d) *FRCP* provides as follows:

> "(d) If a party . . . wilfully fails to appear before the officer who is to take his deposition, after being served with a proper notice, or fails to serve answers to interrogatories submitted under Rule 33, after proper service of such interrogatories, the court on motion and notice may strike out all or any part of any pleading of that party, or dismiss the action or proceeding or any part thereof, or enter a judgment by default against that party."

Counsel for the intervening stockholders argue under this rule that the failure to answer interrogatories must be "wilful" citing 4 *Moore's Federal Practice* (2nd Ed.) Sec. 37.04, pp. 2306-2308 and footnote 2. They contend the non-receipt of answers is an insufficient basis for arguing wilfulness. Assuming "wilfully" in Rule 37(d) *FRCP* modifies failure to serve answers, and grammatically this does not appear to be the case (see *Moore* footnote 2 above cited) the Master is of the opinion that the facts and circumstances in the present case are sufficient to show wilfulness. Even if the stockholders knew nothing of the prospective interrogatories until April 1954 the period elapsing thereafter until the bar date of September 15, 1954 would appear to have been amply sufficient to enable them to become informed of their obligations. The self-interest of attorneys and clients alike suggests the unlikelihood of the latter being in the dark as to the Government's

interrogatories. Indeed the record shows persistent action by their attorneys to bring the matter to their clients' attention. The order of the Master dated August 13, 1954 extending the period for answering until September 15, 1954 gave fair and explicit notice to all (and not merely to the *Kaufman* intervenors) as to the likelihood of a dismissal upon good cause being shown for failure to meet the deadline. In this aspect the Master followed the procedure observed in *Dunn* v. *Pennsylvania R. Co.*, 96 F. Supp. 597; *Dann* v. *Campagnie Generale etc.*, 29 F. Supp. 330, and other cases wherein the Court acting *in terrorem* allowed an additional time after which, in the event of non-action, the complaint would be dismissed.

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The present decision is based upon the aggregate of facts and circumstances shown herein and not upon any technical definition of "wilful" even assuming that under Rule 37(d) *FRCP* the failure to answer interrogatories must be "wilful," as to which no opinion is expressed. The word "wilful", as the courts have said, is a word of many meanings (*Spies* v. *U.S.*, 317 U.S. 492, 497; *U. S.* v. *Murdock*, 290 U.S. 389, 394). In the present context it would seem to have the general meaning of failing to answer the interrogatories after being advised of the obligation to do so (*U. S.* v. *Illinois Central R. Co.*, 303 U.S. 239, 242-243). The latter is amply shown in the present record and the non-receipt of answers is sufficient, taking the other circumstances into consideration, to show the failure to answer. Thus the requirements of Rule 37(d) *FRCP* are met. The Master is fortified in his views by the decisions of Chief Judge Laws dated February 19, 1953 and November 16, 1953 (111 F. Supp. 435 and 15 *FRD* 83) dismissing Chemie's main suit for failure to produce documents under Rule 34 *FRCP* and by Judge Pine's decision herein dated December 16, 1953 fixing March 31, 1954 as a bar date after which no further interventions could be filed. The present decision is no more drastic and has equal circumstances to support it. In the event of exceptional cases of

1688

mistake, inadvertence, surprise or excusable neglect, or any other reason justifying relief from a judgment, the party has always the right to proceed under Rule 60(b) *FRCP* covering relief from a judgment or order.

Accordingly the Master is of the opinion that the Government's motion to dismiss must be sustained. An appropriate order should be presented.

WM. J. HUGHES, JR.
Special Master

November 16, 1954

1689 Filed November 19, 1954

Order

Upon the motion of the defendants for an order under Federal Rule 37(d) dismissing the complaints of intervenor-plaintiffs who have failed to serve answers to the interrogatories served upon them by defendants, and after hearing the parties, and upon all the papers and proceedings had herein and after having filed an opinion dated November 16, 1954, granting said motion, now therefore

IT IS ORDERED that the complaints of the intervenor-plaintiffs whose names are listed in the attachment hereto (by this reference incorporated herein) be and hereby are dismissed.

WILLIAM J. HUGHES, JR.,
Special Master.

November 19, 1954
Seen:

[Counsel for Intervenors Kaufman et al.]
[Counsel for Intervenors Attenhofer et al.]
[Counsel for Intervenors Klingler et al.]

1796 Filed, February 7, 1955

Supplementary Order of Dismissal for Failure to Answer Interrogatories

Upon the motion of the defendants, dated September 23, 1954, for an order under Federal Rule 37(d) dismissing the complaints of certain intervenor-plaintiffs, including Benjamin W. Blijdenstein, Jakob Winteler, Emily Taylor, and Klaas Visscher, for failure to answer interrogatories served upon them by defendants, and after having filed an opinion dated November 16, 1954 granting said motion, and after having entered an order on November 19, 1954 which dismissed certain complaints, not including those of the above-named intervenor-plaintiffs, and upon the further motion of defendants, dated February 4, 1955, for a supplementary order dismissing the complaints of the above-named four intervenor-plaintiffs, and it appearing that the time, as extended, of each of the above-named

1797 intervenor-plaintiffs to answer the said interrogatories has expired, now therefore

IT IS ORDERED that the complaints of intervenor-plaintiffs

(a) Benjamin W. Blijdenstein
(Defendants' No. 523);

(b) Jakob Winteler
(Defendants' No. 1664);

(c) Emily Taylor
(Defendants' No. 1727); and

(d) Klaas Visscher
(Defendants' No. 1577)

be and hereby are dismissed.

WILLIAM J. HUGHES, JR.,
Special Master.

February 4, 1955

No objection: C. Frank Reifsnyder, One of counsel for Intervenors Attenhofer et al.

1801 Filed, February 17, 1955

Second Supplementary Order of Dismissal for Failure to Answer Interrogatories

Upon motion of the defendants, dated September 23, 1954, for an order under Federal Rule 37(d) dismissing the complaints of certain intervenor-plaintiffs for failure to answer interrogatories served upon them by defendants, and after having filed an opinion dated November 16, 1954 granting said motion, and after having entered an order on November 19, 1954 which dismissed certain complaints, not including that of Paul Kocher, and upon the further motion of defendants, dated February 10, 1955, for a second supplementary order dismissing the complaint of Paul Kocher, and it appearing that his time, as extended, to answer the said interrogatories has expired, now therefore

1802 It Is Ordered that the complaint of intervenor-plaintiff Paul Kocher (Defendants' No. 2276) be and hereby is dismissed.

William J. Hughes, Jr.,
Special Master.

February 17, 1955

No objection: Edmund L. Jones, Counsel for Intervenors Attenhofer, et al.

1808 Filed June 20, 1955

Opinion on Government's Motion for Summary Judgment

The Government has moved for summary judgment as to certain named intervenor-plaintiffs, members of the Kaufman, Attenhofer and Klingler groups, on the ground they purchased their stock in plaintiff corporation subsequent to the date of vesting and hence their claims are barred by the *Anti-Assignment Statute*, 31 U. S. C. Sec. 203. That statute reads as follows:

"All transfers and assignments made of any claim upon the United States, or of any part or share thereof,

or interest therein, whether absolute or conditional, and whatever may be the consideration therefor . . . shall be absolutely null and void, unless . . .'' (Exceptions inapplicable)

The Government's motion applies only to some, not all of the intervenors. Thus the Kaufmans, Attenhofer and Klingler allege they acquired their personally owned stock prior to vesting. (Kaufman Compl. Par. 7; Attenhofer Compl. Par. 8; Klingler Compl. Par. 6). The Gov-
1809 ernment's motion is addressed to such of their adherents as got their stock later, by assignment. No factual defenses denying interim assignments have been filed in answer to this motion.[1] The *Kaufman* intervenors meet it by contending that under *Kaufman* v. *Societe,* 343 U. S. 156, they are asserting a derivative corporate claim for the return to the corporate plaintiff of the proportion of assets represented by non-enemy tainted stock. As this corporate claim has not been assigned the Kaufman intervenors assert the *Anti-Assignment Statute* is inapplicable. The Attenhofer and Klingler intervenors claim the *Anti-Assignment Statute* was never meant to apply to cases such as the present. However, if it does apply they still claim a right of recovery on the ground they have sued on the Kaufman derivative theory as well as on a personal right of action.[2]

It would appear to be unnecessary to consider whether the *Anti-Assignment Statute* is applicable if the various intervenor-assignees can avail themselves of Kaufman's derivative theory and if, further, that theory, insofar as

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[1] It is true the Klingler intervenors assert there are genuine issues of material facts as to whether any so-called assignment was knowing and deliberate if made prior to the Supreme Court decision in *Kaufman* v. *Societe,* April 7, 1952. However, in view of the basis of the present decision this defense may be disregarded.

[2] The Attenhofer intervenors invoke the Kaufman derivative theory in the Amendment to their Complaint in intervention filed March 2, 1953. Count 2, Paragraph 12 of the Klingler Complaint adopts Count 1, Paragraph 6 of the Kaufman Complaint which sets forth the derivative theory.

"others similarly situated" is concerned,[3] avoids the *Anti-Assignment Statute.* In the opinion of the Master
1810 the answer to these two questions is found in an analysis of the Supreme Court's holding in *Kaufman* v. *Societe,* 343 U. S. 156.

The Kaufman Complaint in intervention was a derivative stockholder's suit filed by Kaufman for his own benefit and that of all other non-enemy stockholders similarly situated. Kaufman's motion to be allowed to file it was denied by the two lower courts but sustained by the Supreme Court (*Kaufman* v. *Societe,* 343 U. S. 156). The Supreme Court's opinion shows on its face that it was dealing with a derivative stockholder's suit. For one thing, that was the only matter before it and hence, technically, any holding that non-enemy stockholders could assert rights directly would amount to dictum. But in addition the opinion states:

> "... petitioners contended that they and other non-enemy stockholders had claims in the corporate assets which it was the corporation's duty to protect. Alleging that the dominant enemy group which had charge of the suit would not press the corporate claim in a manner that would adequately protect the claims of innocent shareholders, petitioners asserted a right to intervene under Rule 24(a) of the Federal Rules of Civil Procedure." (Op. p. 158)

The above quotation emphasizes the very essence of a derivative stockholder's suit, i.e. that it is brought to assert a *corporate* claim which the corporation refuses to assert.[1]

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[3] As already indicated, there is no difficulty as to the two Kaufmans, Attenhofer and Klingler; it is conceded they acquired their stock prior to vesting. The question is whether the others, the late-coming assignees, *can* in this way avoid the *Anti-Assignment Statute.*

[1] This is further indicated by the Supreme Court's reference to Rule 24(a)(2), *FRCP,* the section under which stockholders ordinarily assert derivative corporate rights. The Supreme Court concludes its opinion by stating:

> "This brings the claim of intervention squarely within Rule 24(a)(2) of the Federal Rules of Civil Procedure." (Op. p. 162)

The Court continued:

> ". . . petitioners charge that it is Interhandel's corporate duty to assert a claim for their proportionate interests in the assets . . ." (Op. p. 160)

1811 And also:

> "Petitioners further allege that the corporate management refuses to assert such a claim . . ." (Op. p. 160)

The above quotations clearly refer to the *corporate* claim which the Supreme Court held could be asserted by the Complaint in intervention. The Court deals with the Government argument favoring *individual* suits as follows:

> ". . . it is argued that if nonenemy stockholders are to be given a chance in court (which right is challenged), they should be limited to individual suits for money judgments against the Custodian. . . . But we think the questions involved in disputes like this can be more appropriately resolved in the corporate actions authorized by § 9(a) than by resort to a multiplicity of separate actions." (Op. p. 161)

The Court thus erects a road sign pointing to a corporate action as the right path to follow. The Court next states:

> "In such suits the nonenemy stockholder in his own right may assert his nonenemy character in order to protect his own interest from the enemy taint caused by other stockholders. Courts trying such corporate actions have adequate equitable power and procedural flexibility to protect all interests, even when the corporate recovery is not for the benefit of all stockholders but only for those who are nonenemies." (Op. p. 161)

The matter is clinched by the words "corporate recovery" for although "the nonenemy stockholder in his own

right may assert his nonenemy character in order to protect his own interest from the enemy taint" the end result of his efforts must, the Supreme Court says, wind up in a "corporate recovery". (Op. p. 161)

It follows that under *Kaufman* v. *Societe, supra,* the intervenor's nonenemy taint can be shown by a Complaint in intervention asserting a corporate right to a partial recovery for the benefit of stockholders showing lack of enemy taint. The fact that under *Kaufman* v. *Societe* (Op. p. 161) whatever is recovered will be distributed to these particular stockholders only does not negative the corporate assertion of the right; the corporate claim is the conduit by which the nonenemy segment of the assets is siphoned off into the innocent stockholder's hands.

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The Master has consistently recognized the right to intervene on the corporate theory,[1] though conceding that the *Kaufman* opinion might also be construed to authorize individual assertions of nonenemy stockholders' rights. Out of excess of caution the Master upheld the validity of both theories for purposes of intervention.[2] Law Review articles appear to favor the corporate theory as the basis for the *Kaufman* decision.[3] On the other hand, in *Uebersee* v. *McGrath,* 343 U. S. 212, which was not a derivative stockholder's suit, the Court on the same day it decided *Kaufman* v. *Societe, supra,* remanded an individual's claim imbedded

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[1] In Tr. July 14, 1952 at p. 91 the Master stated: "The Supreme Court has sustained the Kaufman intervention as a derivative stockholder's intervention . . . by way of actual holding." Master's Opinion re Intervention of Attenhofer, July 23, 1952, pp. 2-4. "While the Supreme Court validated the right of a non-enemy stockholder to assert his *pro tanto* claim by a derivative suit, it did not close the door to direct individual assertions of the right." (Op. p. 3) See also Master's Opinion on Objections to Defendant's Interrogatories, Jan. 31, 1953, pp. 5-7, 11-12; also Opinion Denying Stay, July 21, 1953, p. 3.

[2] The Master's uncertainty as to whether Kaufman's derivative theory alone was sustained in the *Kaufman* case is illustrated in the opinions cited in the above footnote; see also Opinion on Defendant's Objections to Interrogatories, June 21, 1954, pp. 1-2.

[3] See 52 *Columbia L. R.* 799, 46 *Am. J. Int. L.* 554; 27 *St. John's L. Rev.* 139; 22 *U. Cincin. L. R.* 276.

in the *Uebersee* case for further proceedings in the light of the *Kaufman* decision. Thereafter the individual,
1813 Fritz Von Opel, filed a *personal* claim for the return of seized corporate property, alleging lack of enemy taint.[1] Also in *Taterka* v. *Brownell*, 117 F. Supp. 506, the Court upheld the right of a non-enemy stockholder to sue directly for the value of his stock and based its decision on the *Kaufman* case. Likewise, *Albert* v. *McGrath*, 104 F. Supp. 891, 896 was a direct as distinguished from a derivative stockholder's suit for a proportionate non-enemy stock interest in seized corporate assets.

To sum up as to the meaning of the *Kaufman* decision, it undoubtedly sustains the right of a non-enemy stockholder to file a derivative corporate claim. All the intervenors involved in the present motion (whether Kaufman, Attenhofer or Klingler intervenors) have asserted their rights in that way.[2] They have a *severable* interest in the corporate assets[3] which the corporation, through the medium of a derivative intervention is entitled to assert. It is settled law that in a derivative stockholders suit or intervention the claim is a corporate one (13 *Fletcher, Corporations*, Sec. 5947, 5953, 6028) and the recovery belongs to the
1814 corporation,[1] (*Fletcher, Corporations*, Sec. 6028),

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[1] See *Uebersee* v. *McGrath*, U. S. D. Ct., D. C. Civil Action No. 26,453. In *Uebersee* v. *McGrath*, 343 U. S. 212, Mr. Justice Minton refers to the "novel holding" of the *Kaufman* decision.

[2] In addition, of course, to direct assertions of the right in the case of the Attenhofer and Klingler intervenors. (Attenhofer, Compl. Count 1; Klingler, Compl. Count 1).

[3] *Kaufman* v. *Societe*, 343 U. S. 156, 161; *Albert* v. *McGrath*, 104 F. Supp. 891, 896; *Taterka* v. *Brownell*, 117 F. Supp. 506. Under ordinary corporation law stockholders do not have such a severable interest. Cf. *Klein* v. *Bd. of Supervisors*, 282 U. S. 19; *First National Bank* v. *Maine*, 284 U. S. 312, 329-330; *Helvering* v. *O'Donnell*, 303 U. S. 370; *Rhode Island Trust Co.* v. *Doughton*, 270 U. S. 69, 81-82.

[1] The prayers of the Kaufman intervention ask a corporate recovery (Kaufman Compl. Count 1, par. 6; prayer 1). So, too, does the Attenhofer Amendment to the complaint and in the alternative the prayers in the Klingler Complaint.

subject, possibly, to the power of the Court to grant direct relief to avoid circuity of action (*Fletcher, Corporations,* Sec. 6028) or as here to earmark the funds for particular stockholders (*Kaufman,* Op., p. 161).

In asserting this claim the corporation does not sue as assignee but in its own right under Sec. 9(a) as construed by the *Kaufman* decision. Hence the *Anti-Assignment Statute* is inapplicable insofar as the corporation's right to sue is concerned. However this only answers half the difficulty. The further question is: when it comes to the proof does the *Anti-Assignment Statute* prevent the corporation from proving that the latest assignee, the present owner of the stock, is an innocent holder? Or is that inquiry irrelevant precisely because of the Anti-Assignment Statute?[2]

The Attenhofer and Klingler intervenors answer these questions by urging that if there are assignments herein they are like assignments by operation of law which are outside the statute.[3] The Master is unable to accede to this contention due to the absence of any intervening legal or governmental act and for the compelling reasons given in *U. S.* v. *Shannon,* 342 U. S. 288, 293. Also these intervenors say that Congress, in reason and common sense, could not have intended the *Anti-*

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[2] Counsel for one group of intervenors finds the answer in the analogy of a corporation's claim against the United States for a tax refund. He states that the *Anti-Assignment Statute* would not diminish the claim by reason of assignments of stock made after the right accrued. This is quite true. But where as here the amount of the corporate recovery depends on the status of particular stockholders a far different question is presented. The question is, does the Statute outlaw proof of non-enemy taint of the assignee?

[3] Citing *U. S.* v. *Aetna Surety Co.,* 338 U. S. 366, primary purpose to prevent buying up of claims against the United States; *Erwin* v. *U. S.,* 97 U. S. 392, *Butler* v. *Gorely,* 146 U. S. 303, not applicable to assignments in bankruptcy; *Seaboard Airline Co.* v. *U. S.,* 256 U. S. 655, *Western Pacific R. Co.* v. *U. S.,* 268 U. S. 271, *Kingan & Co.* v. *U. S.,* 44 F. (2) 447 not applicable to claims acquired in corporate mergers; *Goodman* v. *Niblack* not applicable to voluntary assignments for creditors.

Assignment Statute to apply to stock transfers such as the present.[1]

This type argument is discussed by Judge Learned Hand:

> "When a judge (or a master) tries to find out what the government would have intended which it did not say he puts into its mouth things which he thinks it ought to have said, and that is very close to substituting what he himself thinks right." (*Is a Judge Free in Rendering a Decision?* reprinted in *Learned Hand, The Spirit of Liberty*, p. 108).

The argument however has a certain appeal in the broad sense. There are many assignments of government claims which cannot possibly come within the statute. Thus every delivery of a dollar-bill, or any other sum of paper money, involves an assignment of a claim against the United States.[2] Government bonds are all claims against the United States and are freely assignable;[3] the same is true of 90 day Treasury bills and other forms of government obligations.[4] There are therefore certain types
1816. of property to which the *Anti-Assignment Statute* does not apply. The reason is the property itself: its very nature presupposes its free assignability. The reasons, however, which make U. S. currency or government bonds assignable would appear to apply equally well to corporate stock, even stock of a foreign corporation. Just as a promise to pay the claim of the holder is specified on each government bond so, too, it must be read into

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[1] Applying the theory of such cases as *Guessefelt* v. *McGrath*, 342 U. S. 308, 319; *The Church of the Holy Trinity* v. *U. S.*, 143 U. S. 457; *Erwin* v. *U. S.*, 97 U. S. 392; *U. S.* v. *American Trucking Assn.*, 310 U. S. 534, 543; *U. S.* v. *Kirby*, 7 Wall. 482, 486-437.

[2] Every dollar bill contains the statement "This certifies that there is on deposit in the Treasury of the United States of America one dollar payable in silver to the bearer on demand."

[3] With some exceptions such as World War II bonds Series F and G.

[4] See the *Gold Clause Cases*, *Norman* v. *B. & O. R. Co.*, 294 U. S. 2[illegible]

each stock certificate possessed by a non-enemy tainted stockholder. There is no way to cut away the American assets from a share of non-enemy owned stock. If the sale of the share would divest it of its American rights (so-called) which in large part make up its value the result would be either to prevent its being sold at all or, if sold, to give the United States a wind-fall of the stockholders proportionate share of the seized assets. It is difficult to read such a resultant into Sec. 9(a) of the Trading with the Enemy Act; certainly it militates against the beneficent construction placed upon the Act by the Supreme Court in the *Kaufman case*. When the Supreme Court in that case said that the rights of innocent stockholders must be fully protected (Op., p. 160) it made the statement without qualification; it is difficult to believe it was referring to stockholders far back in the chain of title.

The *Kaufman* decision appears to speak *in presenti*. The Court, as said, stresses that the "rights of innocent stockholders . . . must be fully protected" (Op., p. 160). The Court further says:

> "The innocent stockholder may not have title to corporate assets but *he does have* an interest which Congress has indicated should not be confiscated." (Op., p. 160, italics added.)

1817 These statements do not appear to refer to past stockholders but to present ones. Also the *Anti-Assignment Statute* is limited to "claims" or interests in claims. A claim would appear to indicate a right and some prospect at least of a remedy. There was no idea at all of a remedy herein until the *Kaufman* decision.[1]

The present case involves the pull and tug of contending Congressional policies, the age-old policy of the *Anti-Assignment Statute* on the one hand[2] and on the other the

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[1] This of course does not mean that the *Kaufman* decision created the right or the remedy on April 7, 1952; the Supreme Court simply declared on that date what Congress intended when the statute was enacted.

[2] The government's policy arguments are summed up in *U. S. v. Shannon*, 342 U. S. 288.

Trading with the Enemy Act as construed by the Supreme Court in the *Kaufman case.* The Master admits he is treading in dark areas; as said in *Clark* v. *Uebersee, Finanz-Korp.*, 332 U. S. 480, 488 dealing with this very statute "the problem is not without its difficulties whichever way we turn." However it is felt that the dominant factor is the Supreme Court's emphasis upon the rights of non-enemy stockholders under the 1941 amendment to Sec. 9(a) of the *Trading With the Enemy Act.* (*Kaufman Op.*, p. 160; *Uebersee Finanz-Korp.* v. *McGrath*, 343 U. S. 212.) Either a literal or an expansive construction of the *Anti-Assignment Statute* would in large part nullify the congressional policy there announced.[3] Accordingly the present holding is that the *Anti-Assignment Statute* does not bar the corporate recovery in the derivative interventions herein.

1818 It was suggested by counsel in argument and in the intervenor's briefs that the *Kaufman* decision means that the government must return all assets except such as are enemy tainted. This is an over-simplification; it overlooks the fact that there must be a valid claimant for each dollar of assets to be returned. As above indicated the present holding is that in the derivative interventions filed herein freedom from enemy taint may be shown as to each present stockholder. This holding is intended to give effect to the public policy of Sec. 9(a) as construed by the Supreme Court in the *Kaufman* case. If however the Master be wrong in his viewpoint and the *Anti-Assignment Statute* be held applicable, there is an alternate theory which would appear to meet the objections of the rigorists. That is that in these derivative interventions proof could be submitted of the absence of enemy taint of the stockholders holding stock on the date of vesting. This proof would do no violence to the *Anti-Assignment Statute* because it would relate to non-enemy taint prior to any assignment. Nor, if the claim should be allowed would payment to the corporation appear to violate the statute

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[3] See Learned Hand J. *Op. cit.*, pp. 106-107.

because the corporation is in contemplation of law the claimant and it is not an assignee. The Court could later supervise the distribution of such moneys to present owners of the stock and in so doing could take proper safeguards that the recipients were in no way enemy-tainted.[1]

1819 The government's motion for summary judgment as to the named intervenors is denied.

WM. J. HUGHES, JR.,
Special Master.

June 18, 1955.

1821 Filed July 6, 1955

Opinion on Motion to Intervene or for Substitution

On October 30, 1954 Ottilie Greuter-Wegman bought two shares of Chemie stock from Erwin Wacker who intervened herein as one of the Kaufman (derivative) group on March 31, 1954. She asks to be allowed to intervene under Rule 24 *F. R. C. P.* or to be substituted for Wacker under Rule 25.

The Master's opinion of June 18, 1955 on the government's Motion for Summary Judgment holds that the *Anti-Assignment Statute* 31 *U. S. C.* Sec. 203 does not bar the assertion of a derivative claim by the corporation even though the recovery would ultimately inure to a non-enemy stockholder who acquired his stock subsequently to the date of vesting. The reason, in the opinion of the Master, is the overriding policy of Section 9(a) of the *Trading With the Enemy Act* as construed by the Supreme Court in *Kaufman* v. *Societe,* 343 U. S. 156. It would appear to follow that the same policy applies to the present applicant. There is no essential difference in status between a non-enemy stockholder who acquires his stock subsequent to

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[1] Under this theory the present stockholders who bought after the date of vesting would assert their claims not against the United States but against the corporation for their *pro-rata* share of the corporate recovery.

vesting and one who acquires it later still, i.e., subsequent to the filing of the corporate intervention. In each case it is the *corporation* which asserts the right which, 1822 under the Supreme Court's decision, must be protected. Hence there is no more a violation of the *Anti-Assignment Statute* in the one case than in the other.

Nor is there, in the Master's opinion, any violation of the bar date. The Master's opinion and Order of July 21, 1953 requiring claimants to appear by a date certain or have their claims barred did not change the derivative nature of the Kaufman intervention.[1] So far as derivative claimants were concerned it simply required that those the corporation asserted to be non-enemy tainted should appear by name and be counted at a time when it would do the government the most good.[2] Erwin Wacker, the present applicant's predecessor appeared within the proper time and thus met the requirements of the bar date. Ottilie Greuter-Wegman simply wants the benefit of what her predecessor has done. Under the *Kaufman* decision she must be given what she asks; otherwise, as the Supreme Court notes (Op. p. 162), she might be bound by the main corporate judgment. The government complains of hardship in administration but the hardship, if any, must be attributed to the statute and is inescapable.

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[1] The Master's opinion dated July 21, 1953 recognized the validity of the individual theory but likewise preserved intact the corporate claim. It stated, p. 3:

> "I am therefore of the opinion that individual claimants should, within a reasonable time, come in as parties plaintiff either as intervenors in their own right or by joining in one or other of the interventions already of record. This ruling in no way changes the derivative nature of the Kaufman intervention. Claimants may join in that intervention of the Kaufman theory, or file individual claims in intervention, as they see fit. The intent of this ruling is to preserve to Kaufman and his adherents the right to proceed on his theory unimpaired; the sole requirement is that such claimants shall appear as parties by name within the period fixed; otherwise their stock shall be excluded from consideration on Kaufman's derivative theory."

[2] e.g., by permitting interrogatories to be addressed directly to the stockholder. See opinion of the Master dated January 31, 1953.

1823 It would appear that substitution is the proper procedural approach.[3] Hence the motion to intervene is denied. The motion for substitution is granted.

WM. J. HUGHES, JR.,
Special Master.

July 5, 1955.

1914 Filed November 9, 1955

Memorandum of Decision

There are before me two motions as follows:

Motion of defendant Brownell to vacate the order of the Special Master of June 25, 1955, denying defendants' motion for summary judgment dismissing the complaints of named intervenor-plaintiffs, and for an order granting said motion to dismiss; and

Motion of defendant Brownell to vacate the order of the Special Master of July 12, 1955, granting Ottilie Greuter-Wegmann's motion to be substituted as party-plaintiff in the action.

After hearing extensive argument and giving careful consideration to the opinions of the Special Master and the the exhaustive briefs filed by the parties in interest, I have reached the conclusion that the motions should be severally denied and that the orders of the Special Master referred to should be confirmed.

In reaching this conclusion, I do not want it understood that I have adopted the Special Master's opinions or his reasoning in toto; and I do not hold, and find it unnecessary at this time to hold, that freedom from enemy taint of the present claimants is the sole criterion, but leave for future determination the question whether the right to re-

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[3] Rule 25(c) *FRCP*; 9 *Cyc. Fed. Proc.* (3rd Ed.) Sec. 27.19.

cover is not also dependent upon freedom from enemy taint of the owners of the stock on the date of vesting.

Counsel will submit appropriate orders.

DAVID A. PINE,
Judge.

November 9, 1955.

2008 Filed June 19, 1956

Opinion on Objections to Government's Interrogatories Seeking Data as to Prior Owners of Intervenors' Stock

The Government has propounded interrogatories to various intervenors of the Kaufman, Attenhofer and Klingler groups. These intervenors have answered prior interrogatories to the effect that they acquired their Chemie stock through various Swiss banks and that they do not know the names of the sellers of such stock. The present interrogatories would require these intervenors to obtain from the Swiss banks the names, addresses and nationality of all prior holders of this stock going back to June 14, 1940. If a corporation was a prior holder, the Government asks its place of business and the nationality of its officers, directors and holders of any interest exceeding 30%. It asks the date of acquisition and nature of the interest of all prior holders of intervenors' stock, the encumbrances, if any, of prior holders and whether such prior holders or any company in which they held office were ever blocked, black-listed or proclaimed by any of the Allies in connection with World War II. Representative of the above are the Interrogatories propounded to the intervenor Abbt (Kaufman group), Mayer (Attenhofer group) and Studach (Klingler group). These intervenors and others to whom similar interrogatories have been propounded have filed objections; extensive briefs have been exchanged and oral arguments heard.

2009 Primarily, the intervenors contend that the interrogatories are irrelevant. They say that under

Kaufman v. *Societe*, 343 U. S. 156, the intervenors are asserting on behalf of the corporation claims for the return of the innocent stockholders' proportionate share of the seized American assets. This means, they say, that they must prove the non-enemy stock content of Chemie as of the date of vesting, which they say is the critical date.[1] Having made such proof, the intervenors say the corporation is entitled to recover. Such a corporate recovery, they contend, inures to the benefit of intervenor-stockholders owning stock on the date of recovery,[2] whether or not they owned stock as of the date of vesting.

The Government in its answering Memorandum preserves its position that the intervenors' claims are in no way derivative in character but entirely individual.[3] Its broad position is that not only must the present claimants show lack of enemy taint but they must also show the predecessor-owners of the present intervenors' stock on the date of the declaration of war were free from such taint as well as all succeeding holders. Thus it says the enemy or non-enemy pedigree of each share of intervenors' stock is essential.[4] The Government limits the intervenors' right of recovery to the present intervenors' proportionate share of the seized assets based on their present stockholdings and without regard to the total

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[1] Attenhofer Objections, p. 3, par. 3; p. 4, last paragraph; p. 5, par. 2; Attenhofer Suppl. Memo., p. 4, bottom and p. 5; Kaufman Objections, p. 4, par. 2; p. 5, par. 2; p. 6, par. 2; p. 7, par. 3. The Klingler intervenors adopted the Attenhofer and Kaufman Objections. See also Tr. Jan. 30/56, pp. 49, 89, 112.

[2] Attenhofer Objections, p. 4, par. 3; Kaufman Objections, p. 4, citing *Overfield* v. *Pennroad*, 48 F. Supp. 1008, 1018 and *Central Rwy. Signal Co.* v. *Longden*, 194 F. (2d) 310; p. 7, par. 3.

[3] The Master has held that the interventions herein were based on both a derivative and an individual theory (Master's Op., June 18, 1955; Op. July 23, 1952; Master's Order of Aug. 12, 1952; Judge Pine's Order of Oct. 23, 1952). The derivative aspect of the intervenors' claims was seemingly approved by Judge Pine in his Opinion of Nov. 9, 1955.

[4] Gov. Memo., pp. 5-8, Tr. Jan. 30/55, pp. 83-86, 91-93, 97-98, 104, 112-113.

amount of non-enemy stock on the date of declaration of war.[1] The critical date, it insists, for proof of non-enemy stock ownership is not the date of vesting but the date of outbreak of World War II, December 7, 1941.[2] In this respect the Government urges a different date than that mentioned by Judge Pine who, in his opinion dated November 9, 1955, stated:

> "I do not hold and find it unnecessary at this time to hold, that freedom from enemy taint of the present claimants is the sole criterion, but leave for future determination the question whether the right to recover is not also dependent upon freedom from enemy taint of the owners of the stock on the date of vesting."

It is believed that the answer to most of the opposing contentions as to the relevancy or irrelevancy of the government's interrogatories lies in an analysis of *Kaufman* v. *Societe, supra.* In that case the Supreme Court on the basis of its decision in *Clark* v. *Uebersee Finanz-Korporation,* 332 U. S. 485, sustained the right of the Government to seize assets of neutrals, i.e. the American assets of Chemie, a Swiss corporation, but subject to the right of such neutrals, i.e. Chemie, "to have their assets returned if they could prove that they were free of any open or concealed enemy taint" (Op. p. 159). Having dealt with Chemie, a neutral corporation, the Court then comes to consider its stockholders. As to these, the Court says:

> "The corporate veil can now be pierced. Enemy taint can be found if there are enemy officers or stockholders; even the presence of some non-enemy stockholders does not prevent seizure of all the
> 2011 corporate assets. But such a governmental seizure requires consideration of the plight of innocent stockholders. For as stated in the Uebersee

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[1] Gov. Memo., pp. 9-10, Tr. Jan. 30/55, pp. 90, 96.

[2] Gov. Memo., p. 3, Tr. Jan. 30/55, pp. 43, 83-86.

Case, the amendment does not contemplate appropriation of friendly or neutral assets. While Congress has clearly provided for forfeiture of enemy assets, it has used no language requiring us to hold that innocent interests must be confiscated because of the guilt of other stockholders. Nor does the legislative history pointed out persuade us that Congress intended to inflict such harsh consequences upon the innocent." (Op. p. 159).

The Court then states that in respect of neutral corporations, "the rights of innocent stockholders to an interest in the assets proportionate to their stockholdings must be fully protected" (Op. p. 160). The Court states the basis for this holding is not "any technical concept of derivative rights appropriate to the law of corporations." It continues:

> "It is based on the Act which enables one not an enemy as defined in Sec. 2 to recover any interest, right or title which he has in the property vested. The innocent stockholder may not have title to corporate assets, but he does have an interest which Congress has indicated should not be confiscated because some others who have like interests are enemies." (Op. p. 160).

The Court then refers to the allegations of the Kaufman complaint to the effect that plaintiff intervenors are non-enemy stockholders and that it is Chemie's "corporate duty to assert a claim for the return of their proportionate interests in the assets even though other stockholders who dominate the corporation are found to be enemies" (Op. p. 160).

The Court then states that Chemie refuses to assert the innocent stockholders' claim and so they can assert it themselves not by "individual suits for money judgments against the Custodian" but "in the corporate actions authorized by Sec. 9(a)" (Op. p. 161).

The clear meaning of the above is that the Custodian can seize the assets of a neutral corporation—"all the corporate assets" (Op. p. 160), but there immediately arises, by Congressional grant spelled out of Sections 2 and 9(a), a right of action on the part of innocent stockholders to a return of the seized assets proportionate to their stock interests. This right of action arises immediately upon the seizure. The date of seizure is the day the so-called wrong was perpetrated and that is naturally the day the cause of action to right the wrong comes into existence. Who has this right of action? The answer is, obviously, the innocent stockholders on that date. Hence, it was the duty of the corporation when it sued for itself, to assert, in the alternative presumably, the rights of these innocent stockholders. When the corporation refused to do so, the Supreme Court states (Op. pp. 160-161) that these stockholders, acting through Kaufman, could take over the job themselves in the form of a derivative stockholders' intervention.[1] Such intervention, if it is successful, will result in a "corporate recovery" "not for the benefit of all stockholders, but only for those who are non-enemies" (Op. p. 161).

It follows from the rationale of the Supreme Court's holding that the "innocent interest" confiscated by the seizure is the interest of innocent persons who were stockholders of Chemie on the date of vesting.[2] Hence the intervenors have the right and duty to prove the amount of stock owned by innocent stockholders in Chemie as of that

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1 The Government's Memo, p. 7, quotes the Supreme Court's statement, p. 160, that its holding "is not based on any technical concept of derivative rights appropriate to the law of corporations" to support its contention that the Supreme Court in *Kaufman* did not recognize Kaufman's intervention as derivative. The above quotation from p. 160 deals with the *source* of the public policy of Congress which, the Court in effect says, it gleans from the Act as a whole, and not from any "technical concept of derivative rights." The opinion makes clear later, pp. 160-162, that the Kaufman intervention is derivative in character.

2 I.e., their interest in the seized American assets "proportionate to their stockholdings" (Op. p. 160).

date. The various groups of intervenors have formally adopted this position.[3]

2013 The "critical date", therefore, as of which to calculate the *amount* of innocent holders' stock for purposes of a present corporate recovery is the date on which the American assets were vested. But the date of vesting is not necessarily the "critical date" as of which to determine whether certain stockholders of Chemie were enemy or non-enemy in character under Section 2. The Government is quite right in contending that if certain stock was owned by enemy tainted persons on the date war was declared, they could not make valid assigment subsequent to that date to prevent vesting. (50 *U. S. C.* App. Sec. 7(b); *Societe Suisse, etc.* v. *Cummings*, 69 App. D. C. 154, 161; 99 F. (2) 387, 394; *Schrijver* v. *Sutherland*, 57 App. D. C. 214, 19 F. (2) 688; *Miller* v. *Schutte*, 52 App. D. C. 359, 287 F. 604, 607; *Uebersee Finanz-Korporation* v. *Brownell*, 133 F. Supp. 615, 627; *Rusche* v. *Brownell*, Civil Action No. 2511-52, Dist. Ct., D. C. 1955 unreported; *Sarthou* v. *Clark*, 78 F. Supp. 139; *Hansen* v. *Brownell*, 132 F. Supp. 47, mod. 135 F. Supp. 117, aff'd. C. A. D. C. May 10, 1956 unreported). The cases cited by the intervenors do not hold that as between the date of declaration of war and the date of vesting the latter date governs as to enemy taint. Some of these cases deal with the date of ownership to support a claim under Section 9(a), i.e. a date immediately prior to the date of vesting. Others merely voice the general rule that to support a vesting order the Government can show enemy taint as of the date of vesting or, where apposite, at any other time during the war.[1] As the Government states,[2] the recitals in a vesting order

[3] Tr. Jan. 30/56, pp. 89, 112; Attenhofer Objections, p. 3, par. 3; p. 4, last paragraph; p. 5, par. 2; Kaufman Objections, p. 4, par. 2; p. 5, par. 2; p. 6, par. 2; p. 7, par. 3. The Klingler intervenors adopted these viewpoints.

[1] *Behn, Meyer & Co.* v. *Miller*, 266 U. S. 457; *Swiss National Ins. Co.* v. *Miller*, 53 App. D. C. 173, 289 F. 571, aff'd., 267 U. S. 42; *Sarthou* v. *Clark*, 78 F. Supp. 139.

[2] Tr. Jan. 30/56, p. 105.

are not binding; a trial under Section 9(a) is a trial *de novo*. In the present case the intervenors admit that they must prove the amount of stock owned by innocent persons as of the date of vesting.[1] If the Government can show that any of this stock was owned by enemy tainted persons within the meaning of Section 2 at a date subsequent to the declaration of war and before the date of vesting, it is entitled to do so; an assignment from an enemy to an innocent person in between the two dates would be invalid to prevent seizure and retention.[2] To repeat, under *Kaufman* it is only the stock of innocent persons on the date of vesting which must be returned (Kaufman Op. pp. 160-161). An assignee of an enemy holder would clearly not be an innocent person if the assignment were made after the declaration of war and prior to the date of vesting. As the Government points out, were such a person to be deemed innocent all rights of seizure could be defeated by the enemy holder simply selling to a non-enemy.[3]

If, however, the intervenors prove the amount of stock held by innocent persons (within the meaning of Section 2) as of the date of vesting it follows that subsequent assignments are immaterial unless they result in a present ownership by an enemy-tainted person. As the intervenors point out, it is extremely unlikely that an enemy purchased any Chemie stock after the American assets were vested (Tr. Jan. 30/56, p. 110).

To recapitulate, the rationale of the *Kaufman* decision indicates:

(1) The intervenors must prove the amount of

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[1] See Footnote 4, p. 5 hereof.

[2] 50 *U. S. C. App.* Sec. 7(b); *Societe Suisse* v. *Cummings*, 69 App. D. C. 154, 161, 99 F. (2) 387, 394; *Schrijver* v. *Sutherland*, 57 App. D. C. 214, 19 F. (2) 688; *Miller* v. *Schutte*, 52 App. D. C. 359, 287 F. 604, 607; *Conrad* v. *Waples*, 96 U. S. 279, 287.

[3] Government's Memo., p. 6.

innocent person's stock as of the date it was vested.

2015 (2) The critical date for determining whether such persons are "innocent" or not is the date of declaration of war, or any date in between that date and the date of vesting if such persons acquired this stock between the two dates.

(3) Chemie, through the medium of the derivative interventions herein, is entitled to a recovery of the innocent stockholders' proportionate share of the seized American assets, the amount of their stock to be calculated as of the date of vesting.

(4) The original intervenors and those similarly situated upon a showing of personal immunity from enemy taint within the meaning of Section 2, are entitled to a division among themselves of the fund so recovered by Chemie.

It should be pointed out that no harm can, in equity, result to the Government as a result of the above holding. The present intervenors can never recover more than what the Government, under *Kaufman,* was morally and legally obligated to return to the innocent stockholders. The right of the present stockholders (intervenors) to step into their shoes is sustained by such cases as *Overfield* v. *Pennroad,* 48 F. Supp. 1008, 1018; *Central Ry. Signal Co.* v. *Longden,* 194 F. (2) 310; indeed it is familiar corporation law.

The present holding prevents frustration of the beneficent purposes of the 1941 Amendment providing for return of innocent stockholders' interests (*Kaufman* v. *Societe, supra,* p. 161). Bearing in mind that in Switzerland each share of stock is represented by a separate certificate [1] (they have no 50 or 100 share or other multiple share certificates), it is obvious that tracing the pedigree

[1] Tr. Jan. 30/56, pp. 110-111.

of each of some 50,000 certificates back to the date of declaration of war would throw an impossible burden on the present claimants. It cannot be thought that Congress intended any such result which would all but nullify the rights of innocent stockholders which it was at such pains to protect.

2016 The Government is in no position to insist that proof be made that each of these 50,000 stock certificates contracted no enemy taint in its passage from person to person after vesting. The *Kaufman* decision says nothing about innocent stock certificates; it speaks of innocent persons. It is enough, therefore, to show that certain innocent persons' property was seized and that certain innocent persons now claim it; the stock certificates cannot be supposed to have incurred a sort of corruption of blood in their transit from the first innocent holder (on the date of vesting) to the last.

It follows from the above that the Government's interrogatories to Abbt, Mayer and Studach and similar interrogatories to others which would attempt to trace the pedigree of the intervenors' stock certificates are irrelevant.

As to whether the interrogatories are also burdensome in the sense that they make the intervenors "go to work" for their adversary (*Aktiebolaget Vargos* v. *Clark,* 8 F. R. D. 635, 636, 12 F. R. S. 390; *Webster Motor Car Co.* v. *Packard Motor Car Co.,* 16 F. R. D. 350, 351, 20 F. R. S. 485, 486) the Master appreciates the exception urged by the Government[1] where the interrogatories pertain to matters which are part of the intervenors' main case. However, for the reasons given, this is not the situation herein.

Likewise, the Master has considered the intervenors' contention that under Treasury Department General License No. 94 as amended March 4, 1947, Germans have been able to acquire property interests in American corporations since December 31, 1946. Hence, they argue that inquiries

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[1] Government's Memo., pp. 11-18.

as to the enemy status of stockholders who purchased their stock subsequent to that date are immaterial.[2] For the reasons given by the Government [3] the Master cannot 2017 agree with this contention. The amendment does not apply to vested property, transactions in which are still prohibited by *General Order No. 31*, issued by the Alien Property Custodian, July 10, 1944 (8 *C. F. R.* 505.1 (1952 Revision)). The Master's opinion of June 18, 1955, approved by Judge Pine November 9, 1955, makes clear that in addition to other proof, freedom of enemy taint on the part of the present claimants is an absolute prerequisite to recovery.

The intervenors' objections to the Government interrogatories to claimants Abbt, Hartmann, Schoop, Bachtel-Familienstiftung, Mayer, Theresia Sturzenegger-Oesterle, and Studach are sustained.

The Government has also propounded interrogatories to various claimants asking particularized information not concerned with pedigree or chain of title. Specific objections have been filed against these interrogatories. The Master considers the Government's efforts to obtain the information desired to be reasonable and relevant. Accordingly, the objections to the interrogatories addressed to the following claimants are overruled: Eisman, Rosenfeld, Goerg, Lichtenstein, Reis, Ruppel & Richter, Doring. Certain of these interrogatories ask for documents. If the intervenors make a point of it, no doubt their objection to producing documents on interrogatories must be sustained (*Roth* v. *Paramount Co.*, 4 F. R. D. 302; *Gutowitz* v. *Penn. R. Co.*, 7 F. R. D. 144; 4 *Moore's Fed. Prac.* Sec. 33.22). However, the claimants can state the substance of the documents and if needed the Government can later file its motion for their production and inspection.

WM. J. HUGHES, JR.,
Special Master.

June 15, 1956.

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[2] Kaufman Objections, pp. 8-11; Attenhofer Objections, p. 6.

[3] Government's Memo., pp. 8-9.

2018 Filed June 28, 1956

Ruling on Ella Kaufmann Motion for Substitution

Julius Kaufmann, an American citizen, having died April, 1954, his widow moves to be substituted in his place as claimant. The Government resists the motion on the ground the husband failed to intervene before the bar date, March 31, 1954.

It appears that on November 22, 1953, Kaufmann, not a lawyer, sent this Court a paper asserting ownership of Chemie shares in the amount of Frs. 14,000 and a right of intervention under "the decision of the District Court of April 7, 1952". The Clerk on December 1, 1953, replied that if he desired to be made a party, he should follow the procedure set forth in FRCP Rule 24 (intervention). He added "There is a fee of $5.00 for filing an intervening petition." In reply Kaufmann on December 7, 1953, sent the Clerk the $5.00 filing fee and declared himself a party. The Clerk on December 11, 1953, replied stating that if he desired to intervene he should follow Rule 24 and that it was the responsibility of the parties "to prepare and submit the necessary motion or petition." He concluded "Your check for $5.00 will be held pending receipt of your motion or petition to intervene." Kaufmann replied

2019 by sending the Clerk a petition dated January 4, 1954, which sets forth the details of his intervention. It lists his shares by number and amount and states that he is an American Citizen. Kaufmann claimed "rights to the assets of the General Anilin Corporation in proportion to my above mentioned shares." Thereupon Kaufmann's original statement dated November 22, 1953, his letter dated December 7, 1953, his letter dated January 4, 1954, and his so-called "intervention" of the same date were filed by the Clerk under date of January 21, 1954. The Clerk retained the $5.00 fee and no further correspondence ensued.

Unfortunately for Kaufmann, he failed to serve any of the above papers on the Government and this is now the

basis of the Government's opposition to the present motion for substitution. Twenty-one months elapsed from January 21, 1954 to January 11, 1956 without service and even then the papers were only served as part of the present motion. The Government cites substantial authorities that the mere filing of a complaint, without more, does not toll the running of limitations, but that service must be made within a reasonable time, in default of which the complaint must be dismissed. Kaufmann's attorneys reply by pointing to equitable considerations, Kaufmann's ignorance of the rules, etc., that the suit is equitable in character, governed by laches and not limitations and that no harm can result to the Government.

The Master cannot give ear to these equitable considerations. It seems clear that there was no compliance herein with the Master's Order of July 21, 1953, as amended by Judge Pine's Order of December 16, 1953, establishing a bar date. That order preserved to claimants complete freedom of choice as to the way in which they should assert their claims, i.e. by joining in an existing intervention, or by filing a new complaint in intervention. The order is clear, however, that whatever method was chosen service of the necessary papers on the Government was essential. The Master's Order of July 21, 1953 provided:

> "Appearances and additional complaints in intervention need not be served on all intervenors, but only upon the defendants and such other parties, if any, as may under Rule 5(a) of the Federal Rules of Civil Procedure be affected thereby."

The Order containing the above provision was served on all parties of record, including existing intervenors, and also upon the Protective Committee in Switzerland. It was also published once a week for three successive weeks in both Swiss and American newspapers.

The requirement of service was obviously reasonable; without it the Government might never find out about the particular claimant or his claim and thus the bar date would for all practical purposes be ineffective. Rule 4 *FRCP* requires service; without service the bare filing of a complaint, without more, is ineffective to toll the statute of limitations. A similar rule should apply to compliance with a bar dated. *Harris* v. *Stone,* 115 F. Supp S 31 D. C., D. C. 1953; *Maier* v. *Independent Taxi Owners Assn.* 68 App. D. C. 307, 96 F. (2d) 579 (1938); Cf. *Bowles* v. *Dixie Cab Assn.* 113 F. Supp. 324 (D. C., D. C. (1953)).

The bar date not having been complied with, the Government's opposition to the present motion must be respected. Accordingly the motion of Ella Kaufmann for substitution and for leave to file an Amended Complaint in Intervention is denied.

/s/ Wm J. Hughes, Jr.,
Special Master.

June 27, 1956.

2021 Filed August 29, 1956

Opposition of Attenhofer Intervenors to Defendants' Motion for Issuance of Pre-Trial Orders

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2022 As the Special Master so ably pointed out, the clear meaning of the Kaufman opinion is that while the Alien Property Custodian can seize all the assets of neutral corporations, there immediately arises a right of action on the part of innocent shareholders to a return of the seized assets proportionate to their stock interests and this right stems from the Congressional grant of Sections 2 and 9(a) of the Trading With The Enemy Act. This right of action arises on the day the so-called wrong was perpetrated, i.e., the date of vesting. Since the innocent stockholders on that date had the right of action, the Special Master stated it was the duty of the corporation, when

it sued for itself, to assert (alternatively) the rights of innocent shareholders and when the corporation failed to do so the shareholders could take over the job themselves in the form of a derivative shareholders intervention. The intervention, if successful, will result in a "corporate recovery" "not for the benefit of all stockholders, but only for those who are non-enemies." (Opinion, page 161)

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[Signed by counsel for Attenhofer Intervenors]

2031 Filed August 31, 1956

Opposition of the Kaufman Intervenors to Defendants' Motion for Issuance of Pre-Trail Orders

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2034 To buttress their contentions, defendants refer to a number of prior utterances in this case which do not in fact support their position. The brunt of the cited statements, holding—as is conceded—that the recovery here should be proportionate to the innocent *stockholders'* interest on the *vesting date*[1] cannot be glossed to mean that the recovery should be proportionate to the innocent plaintiffs' interest on the bar date, as proposed order 2(b) would have it.

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[Signed by counsel for Kaufman Intervenors]

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[1] That holding, as we have pointed out, has its corollary: the amount retained by the Government should be proportionate to the enemy interest on the vesting date, no more and no less.

[R. 491—Appeal No. 13,700]

Filed October 30, 1956

Findings of Fact and Conclusions of Law

The above-entitled cause came on for hearing on October 5 and 8, 1956, on three motions:

(1) "Motion for Interim Restraining Order and for Injunction", filed September 25, 1956, by plaintiff-intervenors known as the Kaufman group.

(2) "Motion for Preliminary Injunction", filed September 25, 1956, by plaintiff-intervenors known as the Attenhofer group.

(3) "Motion for Preliminary Injunction", filed September 26, 1956, by plaintiff corporation.

The cause was submitted on the aforesaid motions, the affidavits, memoranda and exhibits filed in support and opposition, and argument of counsel, and after due consideration thereof, and having filed the memorandum opinion of the Court, dated October 10, 1956, the Court finds and concludes:

[R. 492—Appeal No. 13,700]

Findings of Fact

(1) Plaintiff (herein called Interhandel) is a corporation organized under the laws of Switzerland which claims to be the owner of 455,624 shares of Common A stock and 2,050,000 shares of Common B stock of General Aniline & Film Corporation (herein called GAF) which defendant's predecessor vested under the Trading With The Enemy Act (50 U. S. C. App. 1, et seq.). Plaintiff Corporation's complaint was dismissed with prejudice by the District Court. The record in this Court and in the United States Court of Appeals for the District of Columbia Circuit speaks for itself as to the proceedings which have occurred since then.

(2) Plaintiff-intervenors allege that they are stockholders of plaintiff-Interhandel, assert a non-enemy status, and seek a proportionate share of the seized property under the authority of *Kaufman et al.* v. *Societe Internationale, etc. et al.*, 343 U. S. 156.

(3) GAF has an authorized capital of 3,000,000 shares of Common A stock and 3,000,000 shares of Common B stock. By reason of vesting orders numbers 5 and 907 defendant's predecessor vested 455,624 shares of the GAF Common A stock and all of the outstanding GAF Common B stock (2,050,000 in number) which Interhandel brought suit to recover. In addition, defendant's predecessor acquired 65,085 shares of GAF Common A stock in exchange for all the stock of General Dyestuff Corporation which he vested from others, and 20,185 Common A shares of GAF vested from other sources and claimed to be enemy-owned, making a total of 540,894 Common A shares of GAF. The remaining 51,848.1 outstanding shares of GAF Common A stock are held by the public. There are 2,043.9 shares of GAF Common A stock and 950,000 shares of Common B stock presently in the corporate treasury.

(4) The Delaware Corporation Law and the present certificate of incorporation of GAF require that a majority of the issued and outstanding stock of GAF vote in favor of any proposed amendment of the certificate of incorpora-

tion for the same to be adopted. They further require that a majority of each class of stock of GAF vote in favor of any amendment which would affect any of the rights of such class, for the same to be adopted. The vested stock held by defendant Brownell constitutes more than a majority of all and of each class of the stock of the Corporation issued and outstanding.

(5) Defendant Brownell is in a position to and in fact does control GAF.

(6) In a notice and proxy statement dated September 21, 1956, the Board of Directors of GAF proposed a plan to change the capital structure of the Corporation as follows:

(a) To retire 2,043.9 Common A shares and 950,000 Common B shares owned by the Corporation, and reduce the capital of the Corporation by $1,001,097.50, being the amount of capital represented by the shares so retired;

(b) To amend the certificate of incorporation to authorize 3,190,969 shares of new Class A common stock of the par value of $10 each, and 5,000,000 shares of new Class B common stock of the par value of $10 each. The shares of the new Class A common stock will be freely transferable, but the shares of the new Class B common stock will be restricted as to ownership and transfer to American nationals. In all other respects the shares will be identical.

(c) To eliminate the present Common A shares and to reclassify each of the 592,742.1 Common A shares without par value, presently outstanding

[R. 494—Appeal No. 13,700]

into four shares each of new Class A common stock of the par value of $10 each; and to eliminate the present Common B shares and to reclassify each of the 2,050,000 Common B shares of the par value of $1.00 each, presently outstanding into 4/10 of a share of new Class A common stock of the par value of $10 each.

(d) Upon reclassification there will be outstanding 3,190,968.4 shares of Class A common stock, and 5,000,000 authorized but unissued shares of new Class B common stock, of which 3,190,969 will be

reserved for the conversion on a share-for-share basis, of shares of the new Class A common stock, at the option of the holders thereof.

(7) At present there are cumulative earnings retained in the business of $76,690,000. The dividend rights attaching to A and B stock are that each Common A share receives ten times the dividend paid on a Common B share.

(8) The proposed plan, if carried out, would alter the rights and privileges pertaining to the vested stock and each class thereof. It would enhance the rights now incident to Common A stock to the detriment of the Common B stock and would have, among others, the following effects:

(a) At present each share of Common A stock and each share of Common B stock is entitled to one vote. The proposed plan would increase the voting rights of the present Common A stock by giving each share four votes and would decrease the voting rights of the present Common B stock by limiting each share to 4/10 of a vote. The present Common B individual and aggregate voting rights would be substantially reduced under the proposed plan.

[R. 495—Appeal No. 13,700]

(b) Under the proposed recapitalization, the present class voting rights established by the certificate of incorporation and the Corporation Law of the state of incorporation, Delaware, would be eliminated in that the present Common A and Common B classes would be abolished.

(c) Each share of present Common A stock has, in the event of liquidation, a $75 preference after which the assets are distributable in equal parts proportional to their holdings to holders of Common A and Common B shares. The proposed plan

would abolish these liquidation rights with detrimental results.

(d) At present Common B stock has the right to subscribe for additionally authorized Common B stock, over the presently authorized 3,000,000 shares, at $1.00 per share. The proposed plan would abolish this preemptive right.

(e) At present, Common A shares may be redeemed at the option of GAF at market price as shown by average quotations on a recognized stock exchange and subject to certain other conditions set forth in the certificate of incorporation. The stock is not listed on a recognized stock exchange. The proposed plan would abolish this redemption provision which is advantageous to the Common B stock.

(f) At present Common A shares may be exchangeable for or convertible into B stock on terms fixed by the Board of Directors. (Par. 4 F, Certificate of Incorporation). The proposed plan would abolish this provision.

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(g) A purpose of the plan is to enable GAF to engage in equity financing by the sale of all or part of the approximately 1,800,000 new Class B common stock not reserved for conversion. Thus the non-American claimants now permitted to buy any newly issued shares would be prevented from purchasing any of the unreserved Class B shares, because they are to be restricted as to ownership and transfer to American nationals. Furthermore, if defendant should sell any of the shares not involved in this action, these shares would likewise be converted into the new Class B restricted common shares unavailable for purchase

by the non-American claimants. The practical effect would be further to impair claimants ability to protect their voting position in GAF.

(9) The proposed amendment to the certificate of incorporation has been approved and authorized by the Director, Office of Alien Property, who is the Assistant Attorney General in charge of all Alien Property matters. The defendant Brownell intends to vote in favor of the proposed plan of reclassification.

(10) Defendant Brownell is considering sale of certain shares vested in him.

(11) The proposed plan would cause irreparable injury to the intervening petitioners.

Conclusions of Law

(1) This Court has jurisdiction of this case and of the parties herein.

(2) In view of the claims of the intervenors this Court need not determine whether plaintiff-Interhandel has standing to seek an injunction in the present posture of the case.

[R. 497—Appeal No. 13,700]

(3) Defendant Brownell is under a duty, once suit is instituted under Section 9(a) of the Trading With The Enemy Act seeking the return of vested property, to retain the vested property. The statutory duty to retain carries with it an obligation to preserve the integrity of the vested property.

(4) Under the proposed plan the vested property would not be retained nor would its integrity be preserved as required. The proposed plan would substitute one property right for a different property right and would substantially alter the rights and privileges pertaining to the vested stock in such a manner as to impair valuable rights

and modify the present nature and character of the stock. It would cause irreparable injury to the intervenors.

(5) The effectuation of the proposed recapitalization by defendant Brownell is prohibited by and would violate Section 9(a) of the Trading With The Enemy Act.

(6) The intervening plaintiffs are entitled to an injunction against defendant Brownell.

Dated: October 29, 1956

/s/ DAVID A. PINE,
Judge.

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871 Filed May 10, 1950

Reply to Memoranda of Plaintiff and Defendants in Opposition to Motion of Eric G. Kaufman, et al. for Leave to Intervene

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873 Defendants have introduced of record two exhibits, as part of an affidavit [5] (and reproduced as an appendix hereto), tending to show (1) the stock distribution and voting control of I. G. Chemie as of 1940 by general classes of stockholders, and (2) the percentage of I. G. Chemie's capital contributed by each of such classes of stockholders. From these exhibits it would appear that the combination known as the Greutert-Sturzenegger Complex owned 39 per cent of the voting stock but had paid in only 14.1 per cent of the corporate capital; that German individuals owned 10.9 percent of the voting stock but had paid in 13.3 per cent of the corporate capital; and that all other stockholders—none of whom the Government so far has claimed to be "enemy"—owned 50.1 per cent of the voting stock and had paid in 72.6 per cent of the corporate capital. As of 1940, plaintiff's total outstanding capital

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[5] Attachment 3 to Affidavit in Opposition to Motion That Depositions Shall Not Be Taken, or That They Shall Be Taken in Switzerland, etc., filed November 15, 1948. The affiant was David Schwartz, Esquire, attorney for defendants.

stock of all classes was 350,000 shares, distributed as follows:[6]

874 The 100,000 shares of preferred stock constituted the principal holding in plaintiff of the Greutert-Sturzenegger Complex. It is the stock holdings of the Complex which defendants relied and rely upon to establish the enemy taint of plaintiff.[7]

After the war plaintiff underwent a capital reorganization, in a measure immaterial here, changing the character of its outstanding capital stock. Plaintiff asserts[8] its capital stock is now divided into the following classes and amounts:

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[6] The nature of plaintiff's capital stock has been copied from page 13 of an official report of the Swiss Compensation Office, such report being incorporated in the affidavit mentioned in footnote 5.

			Fr.	Fr.			Fr.
100000	Preferred shares	Nominal value	100 =	10,000,000	20% paid up	=	2,000,000
140000	Original shares	Nominal value	500 =	70,000,000	100% paid up	=	70,000,000
110000	Original shares	Nominal value	500 =	55,000,000	50% paid up	=	27,500,000
350000	Shares and Votes = Fr.			135,000,000	paid up	Fr.	99,500,000

[7] Defendants' attorney, in argument before this Court, has variously stated that the Complex "owns and is I. G. Chemie" (Transcript of Proceedings before Chief Judge Laws on December 3, 1948, at pages 50-51); that "it is our position, furthermore, that the private banking firm of G. Sturzenegger has been the dominant controller of this plaintiff for the purposes of I. G. Farben" (Transcript of Proceedings before Chief Judge Laws on February 18, 1949, at page 12); that "Sturzenegger is the leader of a group of corporations known as the Sturzenegger Complex and they own much and they own a predominating share in the plaintiff" (Transcript of Proceedings before Judge Bailey on December 1, 1949, at page 4); that it is the Government's position "that Hans Sturzenegger is the epitome of the plaintiff. He is—and this is our own term, it is our charge that he is the arch conspirator. He is the head of the tainted corporations, which are circular in nature and which own a large block of stock in the plaintiff. He dominates the plaintiff" (Transcript of Proceedings before Judge Morris on November 21, 1949, at page 28).

Mr. Schwartz repeated substantially all of the foregoing in his affidavit filed November 15, 1948.

[8] This information was taken from plaintiff's memorandum in opposition to applicants motion, at page 2

100,000 shares of preferred stock (par Sfrs. 100 with 20% paid in);
206,000 shares of common stock (par Sfrs. 500 fully paid), and
27,416 shares of common stock (par Sfrs. 500—½ paid).

The 100,000 shares of 20 per cent paid up preferred stock presumably still constitutes the principal stock holdings in plaintiff of the Greutert-Sturzenegger Complex.

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[Signed by Attorneys for Kaufman]

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912 Filed May 26, 1950

Stipulation

It is hereby stipulated among the parties hereto that the defendants herein may sell at public sale at any time the stock of General Aniline & Film Corporation without regard to the provisions of the Trading with the Enemy Act and that the proceeds of the sale shall instead be subject to the disposition of this action.

Dated at Washington. D. C., May 23rd, 1950.

Attorney for Plaintiff.

Attorney for Defendants.

WILLIAM RADNER,
Attorneys for Applicants for Intervention.

964 Filed October 26, 1950

Certificate of Incorporation and By-laws of Internationale Gesellschaft fuer Chemische, Unternehmungen, A. G.

Basel

(Including the amendments passed on in the general meetings held on December 27th, 1928 and February 20, 1929.)

I.

FIRM NAME, HEAD OFFICE, PURPOSE AND DURATION OF THE COMPANY

SEC. 1

The company is a stock company under the Swiss Obligation Law. The firm name is Internationale Gesellschaft Fuer Chemische Unternehmungen, A. G. (I. G. Chemie), Societe Internationale pour Enterprises Chimiques S. A., It's head office is Basel.

SEC. 2

The company is a holding company. Its purpose is the participation in industrial and commercial enterprises of every kind, particularly of the chemical branch, domestic and foreign, excluding, however, baking and brokerage business.

SEC. 3

The company may establish branches and agencies within and without Switzerland.

SEC. 4

The duration of the company is not limited to a distinct term.

II.

CAPITAL SHARES OF STOCK AND STOCKHOLDERS

SEC. 5

The stock capital is fcs. 290,000,000 divided into Series A, B, C.

Series A	400,000 6% cumulative preferred stock registered in the name of the holders, Nos. 1-400,000, at Fcs. 100 each, paid in with 20%	Fcs. 40,000,000
Series B	40,000 fully paid shares of common stock issued to bearer, Nos. 1-40,000, of fcs. 500 each	Fcs. 20,000,000
965 Series C	460,000 shares of common stock registered in the name of the holders, Nos. 40,001-500,000, of Fcs. 500 each, paid in with 20%	Fcs. 230,000,000
	Total	Fcs. 290,000,000

Inasmuch as the shares are not fully paid, the Board of Directors passes on further payments. If payment is not made within the time limit fixed—it must be at least one month—the Board of Directors is at liberty to either bring action for payment against the respective stockholders or to pronounce forfeited in favor of the company their rights from the stock subscription and their installments already paid, to declare void the respective stock certificates and to issue new certificates for account of the company.

In place of Series C, registered common shares, bearers' shares, will be issued as soon as they are paid to an extent of 50%. In the event that the stockholder requests the exchange of his registered share to a bearer share with concurrent payment of the face value up to 50% before such payment has been passed upon by the Board of Directors, the Board may conform to his request provided the shareholder bears the expenses.

SEC. 6

The stock certificates carry the facsimile signatures of two members of the Board of Directors and, in addition, the certification of an officer of the company.

SEC. 7

The capitalization may be increased on resolution adopted at a general meeting. The stockholders of the company will be offered subscriptions to the new shares in the ratio of their stockholdings, unless a resolution of the stockholders at a general meeting excludes the right for sub ·ription.

SEC. 8

The notices to the common stockholders will be published in the "Schweiserischen Handelsamtsblatt in Bern." The Board of Directors is at liberty to have notices published also in other Swiss and foreign newspapers or magazines. The legality of such notice to the stockholders does not depend however on such further publication.

Notice to the preferred stockholders is to be given by registered letter.

SEC. 9

The company may issue debentures up to the amount of its stock capital and its capital surplus. The authorization of such shares rests with the stockholders assembled in a general meeting. Arrangements of details and floating of such debenture issue is in province of the Board of Directors.

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III.

STATUTORY BODIES OF THE COMPANY

SEC. 10

The stautory bodies of the company are

(a) the stockholders assembled in a general meeting

(b) Board of Directors

(c) Auditors

A—The Stockholders Assembled in a General Meeting

Sec. 11

The general meeting is to be called by the Board of Directors. Invitations have to be issued at least a fortnight before the meeting date. The Board of Directors may reduce this time limit in urgent cases, to seven (7) days.

Certificates for common stock have to be deposited with the company or other depositaries designated by the company at least three (3) days before the meeting, in order to enable proxies to represent the respective shares. As for preferred shares, such parties as are registered as stockholders in the stock ledger eight (8) days before the general meeting, may vote either in person or by proxy.

The order of business of the general meeting has to be published when the meeting is called. Any subject matter which is not included in the order of business published, may only be discussed and passed upon with the consent of all the shareholders represented in the general meeting.

Sec. 12

The annual meetings have to take place at the head office of the company or at some other place if the Board of Directors so decides.

The Chairman of the Board of Directors or, in his absence, some other Director designated by the Board, will preside at the meeting and appoint a secretary and inspector of election. Discussions and resolutions at the general meeting will be evidenced by minutes which are to be signed by the chairman, the secretary and the inspector of election.

Sec. 13

No quorum is required for the general meeting.

967

Sec. 14

Each share of stock is entitled to one vote in the general meetings.

SEC. 15

The casting of votes is to be done openly; it may, however, be done by ballot, if the chairman or the stockholders assembled in the meeting, so decide.

The resolutions at the general meeting are adopted by a majority of votes. In the following cases it is required, however, that resolutions are adopted by a majority of two-thirds of the votes cast:

(a) Decrease of capitalization

(b) Merger of the company with another

(c) Dissolution of the company.

In cases of Paragraph 2, subdivisions (b) and (c), a majority of two-thirds of the voting common stock is required as well as a two-third majority of the preferred and common stock together.

SEC. 16

A regular general meeting is to be convened annually within six months after the close of the fiscal year. Special meetings will take place if the Board of Directors or the auditors deem it necessary.

In addition, special meetings have to be called if the stockholders assembled in a general meeting so decide, or if one or more shareholders, representing together more than 10% of the stock capitalization, so request, and present a signed application evidencing the purpose.

SEC. 17

The following matters are reserved for the general meeting of stockholders, apart from the powers fixed by statute or by-laws.

(a) Acceptance of the report and the motions of the auditors

(b) Acceptance and approval of the income statement and balance sheet, relief of Board of Directors

(c) Passing on the result of the income statement and the balance sheet, fixing the dividend and the time of the payment thereof

(d) Election of directors

(e) Election of auditors.

Apart from the business expressly reserved for the general meeting of stockholders, the general meeting passes on all matters of the company which the Board of Directors deems necessary to place before it for decision or which are submitted to it according to Section 16, paragraph 3.

968 B—The Board of Directors

Sec. 18

The number of Directors shall be at least three.

After expiration of the first three years, the whole Board is subject to reelection.

The members are elected in such way that always after expiration of three years one half of the Directors has to be reelected. If the number of the Directors is uneven, the larger number resigns first.

The order in which the Directors elected after the first three years have to resign will be fixed by drawing lots. The resigning Directors are eligible for reelection.

If the number of the Directors is diminished to less than three, a special meeting has to be called in order to have replacement elections. Newly elected Directors will continue the period of office of Directors who have resigned.

Sec. 19

Each Director has to be holder of ten Common shares. The certificates evidencing these shares of stock have to be deposited with the Cashier of the company for the whole period during which this Director holds office, and furthermore, after its expiration until a general meeting has discharged him. The respective shares of stock cannot be sold or pledged.

SEC. 20

The Board of Directors elects a Chairman every year in the first meeting after the general meeting of the company. The Board of Directors appoints a Secretary who need not be a Director himself.

SEC. 21

The Board of Directors meets as frequently as business requires, in addition always if two Directors so request. Any meeting is to be called by registered letter one week in advance fo a meeting. In urgent cases, a meeting may be called by wire and with a shorter time limit.

Meetings of the Board of Directors are to be called by special invitation of the Chairman issued in his name and the place wherever the invitation specifies.

The discussions and resolutions of the Board of Directors are to be recorded by minutes to be signed by the Directors attending the meeting.

Certified copies of the minutes must be signed by two Directors.

969

SEC. 22

One Director may not represent more than one other Director at a meeting on the strength of a special power in writing given for this meeting.

SEC. 23

The majority of the Directors shall constitute a quorum. Resolutions are adopted by a majority of the Directors present at the meeting. If an equal number of votes is cast for and against a motion, the Chairman has two votes.

Adoption of resolutions by letter is permissible. In such case, the Directors have to be approached for their vote. Every member not so voting may request a meeting, the calling of which voids preceding resolutions voted on by letter.

SEC. 24

The Board of Directors is the body managing the affairs and the legal representative of the company. It has all powers which are not expressly reserved for other bodies. The Board of Directors may appoint Delegates or Committees to supervise the business and to cooperate in important actions by the Officers. Appointment of Officers and fixing of their compensation is done by the Board of Directors who also may appoint special Officers.

The company is bound by contracts bearing the signatures of two authorized Officers. The Board of Directors determines in which manner signatures have to be affixed.

SEC. 25

Every year a fixed sum will be paid out and charged to Profit and Loss Account, designed to be distributed as compensation for expenses and fees among the Directors and Auditors. The amount of this compensation is to be fixed in the General Meeting of Stockholders and will remain unchanged as long as this body does not decide otherwise.

970

C—THE AUDITORS

SEC. 26

The general meeting every year elects two Auditors and two substitutes. The Auditors have to examine the books of the company at the end of every fiscal year observing all duties provided for by the statutes. They furthermore have to place before the general meeting report and motion accordingly.

The report together with the balance sheet and the profit and loss account is to be held for inspection by the stockholders at the Head Offiee of the company at least eight days in advance of the general meeting.

IV.

Balance Sheet, Disbursement of Profits and Surplus

Sec. 27

The books of the company have to be closed and the balance sheet has to be made up as of the same date. Details are governed by the statutory provisions. The first fiscal year closes on December 31st, 1928.

Sec. 28

Five percent of the annual net profit after write-offs have to be transferred to an ordinary reserve account each year until the balance in this account reaches an amount equal to ten percent of the capital stock. At the general meeting of the stockholders it will be decided how to apply the then remaining net profit. As far as dividends are distributed, the holders of Preferred shares receive a dividend up to six percent of the amount paid in on the shares. In the event that the net profit of a year is not sufficient, the unpaid dividends accrued are to be paid in the succeeding years as soon as possible. Holders of Common stock do not receive any dividend as long as holders of Preferred stock are not paid all dividends in arrears at a rate of six percent for each year.

The net profit remaining after payment of the dividend on the Preferred stock may be applied to payments of dividends to the holders of Common stock and to transfers to reserve accounts in accordance with existing agreements. In the event that not all of the Common shares are fully paid, the dividend has to be distributed according to the face value, deducting, however, five percent on the amount not yet paid in, computed from the beginning of the fiscal year pro rata temporis.

In case of an increase of the capital, the resolution
971 authorizing such increase may determine that the computation of the dividends to be paid on the new

shares of stock be different from above computation. The Directors receive a fee at the rate of two percent of the total dividends paid on Common shares, which dividends, however, are first reduced by six percent of the amount paid in on the Common Stock. The Board of Directors passes on the distribution of the Directors' fees among the individual Directors.

SEC. 29

All dividends not collected five years after their due date are forfeited in favor of the company.

V.

DISSOLUTION AND LIQUIDATION

SEC. 30

In case of liquidation of the company, the Board of Directors then in office take charge of the liquidation unless the general meeting determines on some other procedure.

SEC. 31

The power of the Stockholders remain effective during the whole duration of any liquidation. In particular, the stockholders are authorized to give discharge on all statements in connection with the liquidation.

The body carrying out the liquidation may at its discretion freely sell any real property of the company. It also may, if backed by a resolution at the general meeting of stockholders transfer to third persons assets and liabilities of the company to be liquidated.

As for the rest, the liquidation is governed by the provisions of the Swiss Obligation Law.

SEC. 32

The proceeds of any liquidation are first to be applied for repayment of the Preferred shares at a rate of 110 percent. The entire balance belongs to the holders of Common Stock.

VI.

Disagreements

All Disagreements as to the corporate relationships between either the company and its various bodies or between the company and its stockholders and/or between the
972 stockholders and the bodies of the company are to be settled by a court of arbitration excluding proceedings in the ordinary courts. Each party names an arbitrator; the arbitrators elect a chairman. If one party fails to designate an arbitrator or in case the arbitrators cannot agree on the person of the chairman, the necessary appointments are to be made by the President of the Supreme Court of Switzerland.

The Court of Arbitration has to meet at the Head Office of the company.

2044 Filed February 25, 1957

Motion for Injunction under Section 9(a) of the Trading with the Enemy Act

Plaintiff-Intervenors Eric G. Kaufman, et al. move the Court for an order enjoining and restraining the defendant, Herbert Brownell, Jr., his officers, agents, servants, employees and attorneys, including the Director, Office of Alien Property, and his subordinates, and all persons acting in concert or participation with them, from selling, or offering for sale, or otherwise disposing of, the shares of stock of General Aniline & Film Corporation presently held by them or which are in their possession or under their control, until such time as a final judgment or decree shall be entered in this action disposing of the claims of the plaintiff-intervenors in this action, or the suit shall be otherwise terminated.

2045 As grounds for such motion, said plaintiff-intervenors invite the Court's attention to the affidavit of Irving Moskovitz which is attached hereto and to the

memorandum of points and authorities submitted herewith.

Dated February 25, 1957.

/s/ ROBERT E. SHER,
/s/ ISADORE G. ALK,
/s/ JAMES H. HELLER,
1026 Woodward Bldg.,
Washington 5, D. C.
GRAUBARD & MOSKOVITZ,

By /s/ IRVING MOSKOVITZ,
115 Broadway,
New York 6, N. Y.
Attorneys for moving Plaintiff-Intervenors.

2046

Affidavit

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss.:

Irving Moskovitz,

being first duly sworn, on oath deposes and says:

I am one of the attorneys for the moving parties and I am familiar with the proceedings heretofore had in this action and with the matters involved herein. This affidavit is made in support of the motion for an injunction restraining defendant Herbert Brownell, Jr., his officers, agents, servants, employees and attorneys, and all persons in active concert or participation with them, from selling or offering for sale the stock of General Aniline & Film Corporation presently held by them, or which is in their possession or under their control, until the pending suit is finally disposed of.

1. General Aniline & Film Corporation has an authorized capital stock of 3 million shares of common A stock and 3 million shares of common B stock, of which 592,742.1 common A shares and 2,050,000 common B shares have

been issued and are outstanding. By virtue of certain vesting orders issued by predecessors of defendant Brownell, 475,809 of the outstanding common A shares and the entire 2,050,000 common B shares were vested; and all such shares are now held by defendant Brownell. In addition, defendant subsequently acquired 65,085 common A shares in exchange for the stock of General Dyestuff Corporation which also had been vested. The right of defendant to this stock is yet to be determined in the course of the pending litigation. The total number of shares presently held by defendant Brownell is 540,894 common A shares and 2,050,000 common B shares. The remaining 51,848.1 2047 common A shares are held by the public.

2. In October 1948 plaintiff corporation, Interhandel, commenced an action under Section 9(a) of the Trading with the Enemy Act, as amended, to recover 455,624 common A shares and 2,050,000 common B shares which it claimed belonged to it. Thereafter, early in 1950, Eric G. Kaufman, et al., on behalf of themselves and all other nonenemy stockholders of plaintiff similarly situated, moved to intervene in said action for the purpose of asserting a corporate derivative claim under Section 9(a) of the Act for the return of all of the vested stock except so much as might be commensurate with enemy stock interests in Interhandel. On April 7, 1952, the Supreme Court ordered that such intervention be allowed as a matter of right. *Kaufman* v. *Societe Internationale, etc.*, 343 U. S. 156. The Court held that the Government was entitled to retain only that part of the assets of an enemy-tainted corporation organized under the laws of a neutral country which is commensurate with the enemy stock interest therein, that the balance must be returned for the benefit of nonenemy stockholders, and that the corporate claim for the return of such balance could be asserted in a derivative stockholders' action such as the one before the Court.

3. Thereafter an order was entered in this Court granting the motion to intervene and approving the filing of the

derivative complaint in intervention. Mathilde Abbt, et al., joined in this derivative complaint in intervention and complaints in intervention adopting *inter alia* the original basis for intervention were filed by other plaintiff-intervenors. The claims asserted by the complaints
2048 in intervention are still pending and are the subject of active litigation before this Court.

4. While some of the legal issues in the case have been passed upon by the Special Master and this Court, the basic factual issues remain unresolved.

The principal factual issue is the extent of enemy stock interest in the plaintiff corporation on the date of vesting. It is alleged in the complaint of intervenor-plaintiffs *Kaufman, et al.* that it appears of record in the principal action that approximately 10.9 per cent of the stock of Interhandel was owned by enemies at the time of vesting. In the answer of the defendants to the complaint in intervention it is admitted "that it appears of record in the principal action that at least 10.9 per cent of the shareholders of plaintiff were nationals of Germany, and therefore enemies, at the time the properties involved were vested." [It should be noted that some of these may nevertheless be nonenemies under the Trading with the Enemy Act.] The number of shares of Interhandel actually owned by enemies at the time of vesting and the percentage which these shares bear to the total shares of Interhandel outstanding at the date of vesting remains to be determined.

There is also a question as to the status of the Interhandel shares which were held by General Aniline & Film Corporation at the date of vesting. It appears from the pleadings on file herein and from the Annual Reports of the Alien Property Custodian that at the date of vesting General Aniline & Film Corporation was holding 84,900 shares of common stock of Interhandel. Because of Interhandel's ownership of General Aniline, this in effect constituted Treasury stock. After the vesting, de-
2049 fendant's predecessors caused General Aniline & Film Corporation to distribute said Interhandel

shares as a dividend to the stockholders of General Aniline & Film Corporation. As a result, 81,400 shares of Interhandel were transferred to defendant's predecessors by way of dividends and are presently held by defendant Brownell. A determination of the status of such shares will have a bearing on the question of the total number of Interhandel shares which were issued and outstanding on the date of vesting.

Additional issues are presented by the exchange of General Dyestuff Corporation shares for General Aniline shares.

5. On January 14, 1957, General Aniline & Film Corporation, acting pursuant to instructions from defendant Brownell, filed a Registration Statement with the Securities and Exchange Commission, which states that the Attorney General proposes to invite bids for the purchase from him of 426,988 common A shares and 1,537,000 common B shares of General Aniline & Film Corporation as an entirety and, if satisfactory ~~bids~~ are received, to sell the stock to the successful bidder. The Registration Statement states that the Attorney General is the record holder of 540,894 common A shares which, at October 31, 1956, represented 91.25% of the outstanding common A shares, and 2,050,000 common B shares which, at October 31, 1956, represented 100% of the outstanding common B shares of General Aniline.

6. The Registration Statement became effective on February 20, 1957. The defendant has advised that he will issue invitations to bid on February 25, 1957, and that
2050 the bids will be opened on April 23, 1957.

7. The great bulk of the shares of stock which the Attorney General proposes to sell as an entirety is the very subject of the litigation now pending before this Court as described above. Section 9(a) of the Trading with the Enemy Act requires that, upon the filing of suit to establish any interest in vested property, the vested property shall be retained in the custody of the Alien Property Custodian until the litigation is terminated and that, upon the entry

of a final judgment in favor of claimants, the property shall be returned to them in kind. While the suit is pending, the power of the Custodian to sell or otherwise dispose of the vested property is suspended. No final judgment disposing of the claims asserted by the plaintiff-intervenors has been entered in this action, nor has the litigation been otherwise terminated. The proposed sale is therefore in direct conflict with the provisions of said Section 9(a) and beyond the authority granted to the defendant under the Trading with the Enemy Act. An injunction is required in order to enforce the mandate set forth in said Section 9(a) of the Act. Unless the defendant is enjoined and restrained by this Court from effectuating the proposed sale, the plaintiff-intervenors will be prevented from obtaining a return of the property in kind and will be deprived of the full and effective remedy to which they are entitled under the Constitution and Section 9(a) of the Trading with the Enemy Act, and will suffer irreparable damage. An injunction is also required in order to protect the jurisdiction of this Court over the vested property and to preserve the power of this Court to enforce any judgment which might be entered in this action.

IRVING MOSKOVITZ.

Subscribed and sworn to before me this 21st day of February, 1957.

PETER N. SCHILLER,
Notary Public, State of New York,
No. 30,8809550,
Qualified in Nassau County,
Certificate filed in New York County,
Term Expires March 30, 1958.

2051 Filed February 25, 1957

Motion for Injunctive Order Requiring the Attorney General to Comply with the Provisions of Section 9(a) of the Trading with the Enemy Act

Come now the Attenhofer plaintiff-intervenors and move this Court for an injunctive order restraining and enjoining defendant Herbert Brownell, Jr., his agents, servants, employees, attorneys, and any and all persons, associations, partnerships and corporations in active concert or participation with him from proceeding with a proposed plan to sell 426,988 common A shares and 1,537,500 common B shares of General Aniline & Film Corporation now held and in the possession of the defendant Brownell, until such time as a final judgment or decree shall be entered in this action disposing of all claims asserted therein or until this action shall be otherwise finally terminated.

For reasons therefor, these appellants respectfully invite the Court's attention to the accompanying affidavit of Edmund L. Jones, Esq., and the Points and
2052 Authorities filed this day in this Court.

HOGAN & HARTSON,

By /s/ EDMUND L. JONES,
/s/ PAUL R. CONNOLLY,
/s/ C. FRANK REIFSNYDER.

Dated: February 25, 1957.

2064

Affidavit

I, **Edmund L. Jones**, being first duly sworn, on oath depose and say:

I am one of the attorneys for the Attenhofer group of intervenors and am familiar with the proceedings heretofore had in this case and in matters involved therein. This affidavit is made in support of the Motion of the Attenhofers for an injunction to prevent defendant Brow-

nell, his agents, servants, employees, attorneys, and any person in active concert or participation with him from proceeding with a proposed plan to sell shares in the General Aniline & Film Corporation (hereinafter called "General Aniline").

In 1942, defendants' predecessors vested all of the outstanding class B shares of General Aniline, namely, 2,050,000 shares, and 455,624 shares of class A stock. According to the Prospectus issued February 21, 1957, by General Aniline (copy of which, together with Registration Statement, as amended, and exhibits, are hereto attached and marked Exhibit A) there are now 592,742.1 common A shares outstanding, 540,894 of which are held by defendant Brownell. Included in the 540,894 shares are 65,065 shares issued by General Aniline to defendant Brownell in exchange for all of the stock of General Dyestuff Corporation (which also had been vested by de-defendants' predecessors from others).

Additionally, defendant Brownell holds 20,185 class A shares elsewhere acquired and there are 2,043.9 shares of the class A stock in the corporate treasury.

I have examined the Registration Statement, as amended, and exhibits thereto. This Registration Statement makes it clear that defendant Brownell intends to dispose of 426,988 common A shares and 1,537,500 common B shares by a public sale and that closed bids will be opened on Tuesday, April 23, 1957. The Deputy Director, Office of Alien Property, has furnished me with a copy of a letter dated February 20, 1957, which was addressed to the Honorable David A. Pine, Associate Judge of the
2065 United States District Court for the District of Columbia in which he stated: "The Attorney General will make a public announcement offering the shares on Monday, February 25th, and the closed bids will be opened on Tuesday, April 23rd."

Section 9(a) of the Trading with the Enemy Act requires that upon the filing of suit thereunder, the vested

property shall be retained and, upon final judgment in favor of the claimants, shall be returned intact and in kind to them. As is more fully set out in the Points and Authorities this day filed herewith, the Attenhofer intervenors have asserted a corporate claim for the recovery of so much of the vested stock as is proportionate to the non-enemy stock holdings in Interhandel on the date of vesting.

Unless defendant Brownell is enjoined from the proposed sale of General Aniline shares, the provisions of the Trading with the Enemy Act will be violated and any judgment which these intervenors recover decreeing a return of vested property will be a nullity.

/s/ EDMUND L. JONES

Subscribed and sworn to before me this 25th day of February 1957.

/s/ CARMEL MOTTA,
Notary Public

2172 Filed March 2, 1957

Affidavit of Dallas S. Townsend

WASHINGTON
DISTRICT OF COLUMBIA, SS.:

Dallas S. Townsend, being duly sworn, deposes and says:

I am an Assistant Attorney General of the United States and Director of the Office of Alien Property in the Department of Justice.

Some 93 percent of the stock of General Aniline & Film Corporation was vested by the Government back in 1942. Action has now been initiated to return stock control of General Aniline & Film Corporation to private ownership at the earliest possible date. To this end, there was filed with the Securities & Exchange Commission a registration statement, effective February 20, 1957, announcing the

Attorney General's intention to make a public offering of 75 percent of the I.G. Chemie-claimed stock of General Aniline & Film Corporation. In such a sale, conditions will be imposed to insure that the corporation will not revert to foreign ownership or control. This action has been taken in what I consider to be the public interest.

2173 General Aniline & Film Corporation is a large manufacturing enterprise employing in its business properties of the value of $160,000,000 and having a net worth of about $110,000,000. It is one of our largest dyestuff producers, an important factor in our chemical industry, and the second largest domestic producer of photographic materials. It employs over 8,500 persons, to whom it paid $44,600,000 in wages and salaries in 1956.

This enterprise is highly important to the welfare of the areas in which its production plants are located and to our national defense as well. Since 1946, General Aniline & Film Corporation has been designated by the Attorney General as a "key corporation" of importance in fields closely related to our defense economy. See Sections 505.10 and 505.13 of the Regulations of the Office of Alien Property, Department of Justice (8 C.F.R., Chap. II, Secs. 505.10, 505.13). Over 80 percent of its output would be required for national defense in event of a military emergency. The strength of this enterprise, and its continued existence as a competitive force in the important fields in which it is engaged, are undeniably matters affecting the national interest.

General Aniline & Film Corporation has been under Government control since 1942. The inflexibility inherent in such control and the doubt as to the ultimate disposition of the business have seriously hampered the operations of the company. The company's management believes that new capital, difficult to obtain under Government control, is necessary to maintain the corporation in a strong competitive position. Fear of insecure tenure

makes it difficult for the company to attract and hold qualified research and executive personnel. These and other disadvantages of Government ownership have created difficulties in maintaining this company on a sound basis, although its maintenance as a strong producer is important to the public interest and welfare, regardless of the outcome of the litigation.

Since 1948, the management of General Aniline & Film Corporation has strongly advocated the early return
2174 of the corporation to private ownership. See the testimony of Jack Frye, former president of General Aniline & Film Corporation before Subcommittees of the Senate Committee on the Judiciary, Hearings on S. Res. 245, 82d Congress, and S. Res. 47 and 120, 83d Congress, Part I, pp. 504, 512-23, March 12, 1953, pp. 572, 589-95, March 20, 1953 (Attachment 1); and Hearings on S. 34[illegible]et al., 83d Congress, 1st Sess., pp. 197-201, July 21, 1953 (Attachment 2); and extract from the minutes of a regular meeting of the Board of Directors of General Aniline & Film Corporation, August 1, 1956 (Attachment 3). Predecessors of Attorney General Brownell have likewise so recommended to Congress. See the letter of January 12, 1949, from Peyton Ford, then assistant to Attorney General Clark, to the Speaker of the House (Attachment 4); statement of Attorney General McGrath before the Subcommittee of the House Committee on Appropriations, Hearings on the Department of Justice Appropriations for 1952, 82d Congress, 1st Sess., pp. 1, 10-12, February 19, 1951 (Attachment 5). It is my firm conviction that an early public sale of General Aniline & Film Corporation will serve to safeguard this Nation's industrial reserve and thereby strengthen and protect our defense capacity.

DALLAS S. TOWNSEND

Sworn to before me this 28th day of February 1957.

ANNETTA WOLDAR,
Notary Public

2175 Filed March 2, 1957

Affidavit of Sidney B. Jacoby

WASHINGTON
DISTRICT OF COLUMBIA, SS:

Sidney B. Jacoby, being duly sworn, deposes and says:

1. I am one of counsel for defendants in this action and I am familiar with the proceedings herein. This affidavit will show the number of shares of Chemie capital stock outstanding when the Chemie-claimed stock of General Aniline & Film Corporation was vested in 1942 and 1943. (Vesting Orders No. 5 of April 24, 1942, 7 Fed. Reg. 3128, and No. 907 of February 15, 1943, 8 Fed. Reg. 2453). It will also show the number of shares of Chemie's capital stock represented by the Chemie stockholders who have intervened in the action.

2176 2. From June 1940 to the end of hostilities, and thus, of course, at the dates of vesting, I.G. Chemie had 350,000 shares of capital stock outstanding as follows:[1]

Number and Class of Shares	*Par Value*
100,000 shares of 6% preferred, 20% paid in	Sfrs. 100
140,000 shares of fully-paid common	Sfrs. 500
110,000 shares of half-paid common	Sfrs. 500
350,000 Total shares	

3. Pursuant to the Special Master's order of July 21, 1953, as amended and affirmed by the Court, per Judge Pine, on December 16, 1953, complaints in intervention were filed, prior to the bar date of March 31, 1954, by approximately 2,500 Chemie stockholders. According to the

[1] Extracts from Chemie's annual reports showing its balance sheets as of December 31, 1941, December 31, 1942, and December 31, 1948 are attached hereto as Attachment 1. The documents were produced for defendants' inspection in 1950 and bear Chemie numbers B 142, B 143, and B 149; see also Reports of Swiss Compensation Office, 1947, R. 1743 and R. 1773 in C. A. No. 12140.

complaints in intervention, as amended in some instances by the intervenors' answers to interrogatories, a total of 55,363 fully-paid and 1,975 half-paid Chemie common shares were originally represented in the action. No complaints in intervention were filed by, or on behalf of, any of the holders of the Chemie preferred stock.

4. By orders of the Special Master, dated November 19, 1954, February 4 and February 17, 1955, the complaints of some 720 intervenors, holding an aggregate of 15,582 fully-paid and 73 half-paid Chemie common shares, were dismissed because of their failure to answer interrogatories. Counsel for the Attenhofer group consented to the entry of the orders of February 4 and February 17, 1955.

2177 5. I have caused a list to be prepared showing the names and the number of shares held by each of the Chemie stockholders who still remain in the action. The list shows that complaints in intervention are still pending on behalf of approximately 1,770 Chemie stockholders claiming title to 39,781 fully-paid and 1,902 half-paid Chemie common shares. A copy of the list it attached hereto as Attachment 2.

6. The statements in paragraphs 3 to 5, *supra*, may be shown in tabular form as follows:

	Fully-Paid	*Half-Paid*
Number of Chemie common shares held by the original intervenors	55,363	1,975
Number of Chemie common shares held by intervenors who were dismissed for failure to answer interrogatories	15,582	73
Number of Chemie common shares still represented in the action	39,781	1,902

7. A breakdown of the figures mentioned in paragraphs 3-6, *supra*, according to the two stockholder groups is as follows:

Stockholder Group	*Shares Intervening in the Action*		*Shares Dismissed*		*Shares held by Present Intervenors*	
	Fully-paid	*Half-paid*	*Fully-paid*	*Half-paid*	*Fully-paid*	*Half-paid*
Kaufman	21,745	92	4,587		17,158	92
Attenhofer	33,014	1,880	10,949	73	22,065	1,807
Intervenors not represented by the two groups	604	3	46		558	3
	55,363	1,975	15,582	73	39,781	1,902

/s/ SIDNEY B. JACOBY

Sworn to before me this 1st day of March, 1957.

/s/ ANNETTA WOLDAR,
Notary Public

2178

Translation

ATTACHMENT 1

Report

of the Board of Directors of the

INTERNATIONALE GESELLSCHAFT FUER CHEMISCHE UNTERNEHMUNGEN A.-G. SOCIETE INTERNATIONALE POUR ENTREPRISES CHIMIQUES S. A.

(I. G. Chemie)

BASEL

to the Ordinary General Meeting of Shareholders of March 23rd, 1942, relating to the Business-Year 1941.

We have the honour of submitting to you the report of the 14th business-year of our company.

The General Aniline & Film Corporation, New York, our most important participation, has distributed for the business-year ending on December 31st, 1941 a dividend of $3.- on common A shares and of $0.30 on common B shares as against $2.75 and $0.27½ in the former year. The shares of the aforesaid enterprise have, in contrast to their issued debentures, not been quoted.—The dividends of the year 1941 could not be transferred owing to American restrictions; they were merely credited to our blocked account after deduction of the income tax amounting to 27½%. We have therefore not set out the counter-value in question, viz. Fr. 4,654,008.15 in the Profit & Loss account, but solely shown it under Assets as blocked banking-balance, and have booked the corresponding balance under Liabilities to creditors.—According to informations received, the company continues working satisfactorily.

The Norsk Hydro-Elektrisk Kvaelstofaktieselskab, Oslo, reports regarding the business-year ending June 30th, 1941, that the company has worked satisfactorily in all branches from the technical point of view. The company has again declared a dividend of nKr. 10.80 per common share. We have exercised our rights to subscribe new shares on the occasion of the increase of capital which was decided in 1941. We were thus able to realise the 2179 dividend due in 1941, as well as the one of 1940, which had been in arrears owing to transfer difficulties. As for the rest, our relative participation quota with the Norsk Hydro will suffer a decrease, despite the acquisition of the new shares, on account of the special terms of emission.

—

Our participations and securities have increased on the sum total, partly because of conversion of debtors, by Fr. 3,802,781.15 to Fr. 159,402,634.09.

Debtors have, owing to above mentioned conversion into securities and owing to repayments, decreased by Fr. 8,000,023.65 to Fr. 11,258,479.50.

The free available banking-assets amount to Fr. 13,256,-309.18; the blocked banking-assets to Fr. 4,701,506.30.

The decrease of the net proceeds of Fr. 1,381,344.22 is principally due to the aforementioned American blockade measures.

—

Just as last year, we have abstained from any new valuation of our non-quoted participations, especially as far as our share in the General Aniline & Film Corporation is concerned, and particularly because it has been impossible to ascertain a dependable basis of valuation, owing to the difficulties caused by the spreading of the war. We wish to point out again that the repercussions of the war are very difficult to be adequately ascertained with a company of almost entirely international character like ours.

—

The necessary revision as per § 723 of the Code Suisse des Obligations has been carried out by a public accountant firm.

—

We submit to the General Meeting the following propositions for votation:

2180 1. Ratification of the balance with profit and loss account per December 31st, 1941.

2. Giving discharge to the Board of Directors.

3. Distribution of the statutory guaranteed 6% cumulative dividend amounting to Fr. 120,000.— on the 20% paid-in pref. shares, payable from March 24th, 1942 onwards, and carrying over the remaining profit balance of Fr. 1,261,344.22 to new account.

4. Election of controllers.

Basle, March 1942.

THE BOARD OF DIRECTORS.

2181 BALANCE OF DECEMBER 31st, 1941

		Fr.
Assets		
Not paid-in capital		
Pref. shares:		
80% of Fr.10,000,000.—	Fr. 8,000,000.—	
common shares:		
50% of Fr.55,000,000.—	Fr.27,500,000.—	35,500,000.—
Participations and Securities		159,402,634.09
Debtors		11,258,479.50
Bank-Balances: free available		13,256,309.18
blocked		4,701,506.30
Guarantees	Fr. 2,330,350.—	
		224,118,929.07
Liabilities		
Capital		
Pref. shares:		
with 20% paid-in	Fr.10,000,000.—	
common shares:		
fully paid-in	Fr.70,000,000.—	
with 50% paid-in	Fr.55,000,000.—	135,000,000.—
Reserve-funds		80,000,000.—
Creditors		6,835,341.23
Dividends in arrears		902,243.62
Net proceeds		1,381,344.22
Guarantees	Fr. 2,330,350.—	
		224,118,929.07

PROFIT AND LOSS ACCOUNT FOR 1941

	Fr.
Expenses and Taxes	938,285.58
Net Profit	1,381,344.22
	2,319,629.80
Amount brought forward from December 31st, 1940	874,907.72
Gross Profit	1,444,722.08
	2,319,629.80

2182

Translation

Report

of the Board of Directors of the

INTERNATIONALE GESELLSCHAFT FUER CHEMISCHE UNTERNEHMUNGEN A. G.

(I. G. Chemie)

BASEL

to the Ordinary General Meeting of Shareholders of March 9th, 1943,

relating to the Business—Year 1942.

We have the honour of submitting to you the report of the 15th business-year of our company.

Our participation in the General Aniline & Film Corporation, New York, has, at the beginning of the year under report, been taken over by the American Treasury and subsequently by the Alien Property Custodian, so that same must, for the time being, be considered as out of our availability. We have taken immediate steps against these unjustified measures, by which our assets, on erroneous suppositions, have been placed on the same footing as enemy property by the American authorities; suitable action to the purpose of safeguarding our interests has been taken. Our efforts in this matter have unfortunately so far led to no successful result. We shall continue to fight for our rights with every means at our disposal and confidently hope that these will finally be acknowledged.

According to informations received regarding the General Aniline & Film Corporation, the revenues of the company have considerably decreased during the first half year 1942 compared with the former year, probably in consequence of increased taxation, whilst the turnover does not show any important changes. No dates are avail-

able re the final returns of the business year ending December 31st, 1942. On account of ever increasing difficulties in exchange of news with the U.S.A. and the meas-
2183 ures adopted by the American authorities against us, the contact with our affiliated company suffered more and more, so that no details regarding their course of business reached us. We learn that there have been changes in the management of the company, upon which we had no influence.

The Norsk Hydro-Elektrisk Kvaelstofaktieselskab, Oslo, achieved a net profit of appr. 7,45 millions nKr. during the business year ending June 30th, 1942 as against approximately 6,13 millions nKr. in the previous year. The company has again declared a dividend of nKr. 10.80 on common shares. The amount of dividends due to us could partly be realised by compensation.

—

The status of our participations and securities has, in the year under report, increased by Fr. 1,753,864.05 to Fr. 161,156,498.14, mainly on account of the acquisition of Federal bonds.

Debtors have decreased because of repayments from Fr. 11,258,479.50 to Fr. 11,025,001.—.

The free available bank-assets amount to Fr. 11,048,-968.46; amongst same there are Fr. 2,000,000.— time-deposits with Swiss banks. The countervalue of blocked bank-assets in U.S.A., which figures under creditors in the liability-account, amounts to Fr. 4,589,582.25.

The gross proceeds have decreased to Fr. 955,535.05. Taking into consideration the sum carried forward from the previous year, the net proceeds amount to Fr. 1,478,-685.25.

In view of the fact that a reliable basis of valuation is not possible for a company of almost entire international character like ours, as a consequence of war and war-laws, we have abstained from any new valuation of the shares

of the Aniline & Film Corporation, which are the decisive participation in our portfolio.

—

The necessary revision as per § 723 of the Code Suisse des Obligations has been carried out by a public accountant firm.

2184 We submit to the General Meeting the following propositions for votation:

1. Ratification of the balance with profit and loss account per December 31st, 1942.

2. Giving discharge to the Board of Directors.

3. Distribution of the statutory guaranteed 6% cumulative dividend of Fr. 120,000.— on the 20% paid-in pref. shares, payable from March 10th, 1943 onwards, and carrying over of the remaining profit balance of Fr. 1,358,685.25 to new account.

4. Election of controllers.

Basle, February 1943.

THE BOARD OF DIRECTORS.

2185 BALANCE OF DECEMBER 31st, 1942.

Assets		Fr.
Not paid-in capital		
Pref. shares:		
80% of Fr.10,000,000.—	Fr. 8,000,000.—	
common shares:		
50% of Fr.55,000,000.—	Fr.27,500,000.—	35,500,000.—
Participations & Securities		161,156,498.14
Debtors		11,025,001.—
Bank-Balances: free available		11,048,968.46
blocked		4,589,582.25
Guarantees	Fr. 2,301,472.30	
		223,320,049.85

Liabilities

Capital		
Pref. shares:		
with 20% paid-in	Fr.10,000,000.—	
common shares:		
fully paid-in	Fr.70,000,000.—	
with 50% paid-in	Fr.55,000,000.—	135,000,000.—
Reserve-funds		80,000,000.—
Creditors		6,587,798.80
Dividends in arrears		253,565.80
Net proceeds		1,478,685.25
Guarantees	Fr. 2,301,472.30	
		223,320,049.85

PROFIT AND LOSS ACCOUNT FOR 1942

Expenses and Taxes	738,194.02
Net Profit	1,478,685.25
	2,216,879.27
Amount brought forward from Dec. 31st, 1941	1,261,344.22
Gross Profit	955,535.05
	2,216,879.27

2186

BALANCE TO 31st DECEMBER, 1948

Assets		*Fr.*	*Cts.*
Unpaid share capital:			
Preferred shares:			
80% on Fr.10,000,000.—	Fr. 8,000,000.		
Common shares:			
50% on Fr.55,000,000.—	Fr.27,500,000.	35,500,000	—
Participations and securities		167,419,419	59
Debtors		5,275,444	85
Bank balances: freely disposable		9,332,458	62
blocked		4,586,455	85
Capital payment		2,298,250	—
		224,412,028	91

BALANCE TO 31st DECEMBER, 1948

Liabilities		*Fr.*	*Cts.*
Share capital:			
Preferred shares:			
20% paid	Fr.10,000,000.—		
Common shares:			
fully paid	Fr.70,000,000.—		
50% paid	Fr.55,000,000.—	135,000,000	—
Reserve funds		79,400,000	—
Creditors		6,012,514	32
Capital payment		2,298,250	—
Net proceeds from the profit-and-loss account		1,701,264	59
		224,412,028	91

PROFIT- AND- LOSS ACCOUNT FOR THE YEAR 1948

Debit	*Fr.*	*Cts.*
Expenses and taxes	972,912	55
Net profit	1,701,264	59
	2,674,177	14

PROFIT- AND- LOSS ACCOUNT FOR THE YEAR 1948

Credit	*Fr.*	*Cts.*
Balance from previous year	1,570,682	—
Gross earnings	1,103,495	14
	2,674,177	14

2222 Filed March 2, 1957

Affidavit of Francis A. Gibbons

STATE OF NEW YORK
COUNTY OF NEW YORK, ss.:

Francis A. Gibbons, being duly sworn, deposes and says:

I am Executive Vice President and a Director of General Aniline & Film Corporation, herein called "GAF". I

have been employed by GAF since its organization in 1929. In 1941, I became Secretary and continued as such until 1951 when I was elected Treasurer. In 1952 I was elected a Vice President. In 1953, I was elected a Director. On September 19, 1956, I was elected Executive Vice President.

I am familiar with the facts stated herein concerning the I. G. Chemie common stock held by GAF. Before preparing this affidavit, I refreshed my recollection by checking the appropriate records of GAF. The facts are as follows:

In February 1942 and continuously until 1944, GAF owned 56,300 fully-paid and 28,600 50%-paid common shares of I. G. Chemie. This stock was part of a total of 74,300 fully-paid and 80,000 50%-paid Chemie common shares which GAF purchased for investment purposes in 1930 and 1931 from Ed. Greutert & Cie., Basel, Switzerland, at a cost of over $21,000,000. The details of the purchases are as follows:

2223

Date of Purchase	*Number of shares*	*Purchase Price*
	Fully-paid Stock	
May 20, 1931	20,000	$ 3,281,509.70
June 30, 1931	54,300	9,506,032.13
	74,300	$12,787,541.83
	50%-Paid Stock	
March 28, 1930	50,000	$ 4,991,212.50
June 5, 1930	30,000	3,633,674.50
	80,000	$ 8,624,887.00
Total purchase price—		$21,412,428.83

Between March 1934 and June 1937, GAF resold 18,000 fully-paid and 51,400 50%-paid Chemie common shares to Ed. Greutert & Cie., at a loss of $1,387,210.94, as follows:

Date of Sale	No. of Shares	Selling Price	Cost	Loss
		Fully-paid Shares		
May 28, 1935	2,000	$ 303,103.58	$ 328,150.97	$ 25,047.39
June 3, 1935	6,000	963,359.12	984,452.91	21,093.79
April 4, 1936	700	102,507.01	114,852.84	12,345.83
April 6, 1936	1,800	269,446.96	295,335.87	25,888.91
Nov. 27, 1936	5,000	717,870.47	820,377.43	102,506.96
June 11, 1937	2,500	363,322.56	410,188.71	46,866.15
	18,000	$2,719,609.70	$2,953,358.73	$ 233,749.03
		50-% Paid Shares		
Mar. 22, 1934	20,000	$1,617,000.00	$1,996,485.00	$ 379,485.00
May 28, 1935	16,000	1,134,810.50	1,597,188.00	462,377.50
Apr. 4, 1936	1,400	109,340.79	139,753.95	30,413.16
Apr. 18, 1936	3,000	244,064.24	299,472.75	55,408.51
June 5, 1936	7,000	541,635.80	698,769.75	157,133.95
June 11, 1937	4,000	360,470.73	429,114.52	68,643.79
	51,400	$4,007,322.06	$5,160,783.97	$1,153,461.91
	Total—	$6,726,931.76	$8,114,142.70	$1,387,210.94

Thus, GAF's acquisition of 56,300 fully-paid and 28,600 50%-paid Chemie common stock from Ed. Greutert & Cie. in 1930 and 1931, represented an investment of $13,298,286.13, ($9,834,183.10 for the fully-paid and $3,464,103.03 for the 50%-paid stock).

During the years 1931 to 1941 I. G. Chemie paid to GAF a total of $10,255,231.21 in cash dividends on the GAF-held Chemie common stock, as shown below:

Dividends Paid by I. G. Chemie on the GAF-held Chemie Stock

1931	Dividends on 74,300 fully-paid and 80,000 50%-paid Chemie common stock	$ 890,437.47
1932	"	1,599,977.56
1933	"	858,139.23
1934	Dividends on 74,300 fully-paid and 60,000 50%-paid Chemie common stock.	1,283,912.50
1935	Dividends on 66,300 fully-paid and 44,000 50%-paid Chemie common stock	1,283,517.46
1936	Dividends on 58,800 fully-paid and 32,600 50%-paid Chemie common stock	972,122.05
1937	Dividends on 56,300 fully-paid and 28,600 50%-paid Chemie common stock	695,507.86
1938	"	745,559.51
1939	"	731,947.00
1940	"	687,788.70
1941	"	506,321.87
	Total	$10,255,231.21

The minutes of the GAF Board of Director's meeting held on June 7, 1940, indicate that a proxy was given to five members of the I. G. Chemie Board to vote the GAF-held Chemie stock at Chemie's annual meeting to be held on June 28, 1940. The GAF records do not show whether or not the stock was voted at Chemie annual meetings held prior to 1940.

Between December 1, 1944 and October 18, 1946, GAF paid and transferred to the Attorney General, 55,610 fully-paid and 28,238 50%-paid shares of the GAF-held Chemie common stock. The Attorney General elected to receive these shares in lieu of cash dividends on the vested GAF stock (455,624 common A and 2,050,000 Common B 50%-paid represented dividends on the Chemie-claimed GAF stock. Of these shares, 53,984 fully-paid and 27,416 shares), and 626 fully-paid and 822 50%-paid Chemie common shares, represented dividends on vested GAF common A stock which is not involved in the instant proceeding. Other stockholders of GAF elected to receive an additional 460 fully-paid and 244 50%-paid Chemie com-

2225 mon shares in lieu of cash dividends. As a result of these transactions between GAF and its stockholders, the Corporation today holds only 230 fully-paid and 118 50%-paid common shares of I. G. Chemie.

/s/ Francis A. Gibbons

Sworn to before me this 27 day of February, 1957.

/s/ Catherine Vander Wende,
Notary Public, State of New York
No. 60-4072650
Qualified in New York County
Cert. filed with New York Co. Clerk
New York County Register
Westchester County Register
Commission expires March 30, 1957.

2265 Filed March 13, 1957

Affidavit of Paul E. McGraw

Washington
District of Columbia, ss.:

Paul E. McGraw, being duly sworn, deposes and says:

I am one of counsel for defendants in this case and I am familiar with the proceedings herein. On March 2, 1957, my co-counsel, Sidney B. Jacoby, filed an affidavit showing the total number of Chemie shares of capital stock outstanding at vesting and the number of shares represented by the intervenors in the action. Although the intervenors have not filed any opposing affidavits, the Kaufman intervenors have made a number of vague assertions in their reply memorandum (p. 9, n. 3) which should not go unchallenged.

I

Defendants have shown that the intervening stockholders, claiming ownership of 41,683 shares of Chemie

2266 common stock (see Attachment 2 to the Jacoby affidavit, *supra*), represent only 15.439% of Chemie's total outstanding capital stock at vesting. (Defendants' memorandum in opposition, pp. 4-5). In making this determination, defendants treated equally both the fully-paid common (140,000 shares) and the half-paid common (110,000 shares), since each had the same par value, Sfrs. 500 per share. Because the preferred stock has a par value of only Sfrs. 100, each perferred share was treated as equal to one-fifth (1/5) of a share of common, or 100,000 shares of preferred (the total number outstanding) equal to 20,000 shares of common stock. Thus, Chemie should be regarded as having a total of 270,000 shares of capital stock outstanding (20,000 preferred plus 250,000 common shares) at the critical date. The intervenors' stock holdings thus represent 41,683/270,000 or 15.439% of Chemie's total outstanding capital stock at vesting.

In their reply memorandum, the Kaufmans suggest that in determining the intervenors' proportionate share, the preferred stock might be excluded because it "might be entitled to no asset participation beyond its paid subscription price of 20 francs a share . . . leaving all equitable ownership to the common shares" (p. 9, n. 3). But even though the preferred stock be excluded, the intervenors' proportionate share is less than the 25% of the Chemie-claimed GAF stock reserved by the Attorney General. This is easily demonstrated as follows:

Assuming that the preferred stockholders may have rights only to the payment of cash, there would remain only the 250,000 common shares (140,000 fully-paid and 110,000 half-paid common). Giving equal consideration to both classes of common stock, the intervenors (holding 39,781 fully-paid and 1,902 half-paid shares) would represent 41,683/250,000, or 16.673 percent of Chemie's
2267 total outstanding capital stock at vesting. By multiplying the Chemie-claimed GAF stock (455,624 "A" and 2,050,000 "B" shares) by 16.673 percent, the re-

sulting figure shows that the intervenors would be entitled to receive a maximum of 75,967 "A" and 341,797 "B" shares, as compared to 113,906 "A" and 512,500 "B" shares of GAF which will be retained by the Attorney General.

II

The Kaufman intervenors complain that defendants have compared the number and classes of shares presently held by the intervenors with the total number of shares outstanding in 1942. (Kaufman reply memorandum, p. 9, n. 3).

Since only a few of the intervenors indicated in their answers to interrogatories that their present holdings had been converted in 1949 from half-paid common to fully-paid common stock at the rate of 2 for 1,[1] defendants are unable to determine precisely how many shares the intervenors' present holdings represent in terms of numbers and classes of stock outstanding in 1942. From the facts that are available, however, it can be demonstrated that the present holdings could not possibly have exceeded 25 percent of the total number of shares outstanding at vesting.

As shown in the Jacoby affidavit, *supra*, there was no change in the Chemie capitalization between 1940 and December 31, 1948. Pursuant to the resolution
2268 adopted at Chemie's general meeting held on November 22, 1948, the following disposition was made of the 110,000 half-paid common shares:

28,474 shares were paid-up and converted into fully paid common stock;

[1] Fourteen intervenors reported in their answers that their presently held fully-paid stock, totaling 128 shares, had been converted from half-paid shares. The conversion was made pursuant to a resolution adopted at the Chemie general meeting held on November 22, 1948, calling in the half-paid stock. The shares were required to be paid up, or converted into fully-paid common stock on the basis of two for one, by February 10, 1949, or else the stock was declared forfeited.

31,052 shares were converted into 15,526 fully-paid shares of common on the basis of two for one;
23,058 shares were forfeited;
27,416 shares were held in status quo subject to this Court's order of February 3, 1949;

110,000 shares.

See the extract from the translation of the minutes of Chemie's Special Meeting of March 5, 1949, attached as Exhibit 1.

Assuming that the intervenors hold the entirety of the block of converted half-paid common stock, the 39,781 presently held fully-paid stock could be said to equal a total of 55,307 fully-paid and half-paid common stock outstanding prior to the date of conversion in 1949. This may be shown as follows:

39,781 fully-paid common shares presently held by the intervenors
15,526 fully-paid common converted in 1949 from half-paid common stock

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24,255 fully-paid shares that could not have been converted by intervenors
31,052 maximum number of half-paid shares that could have been converted by intervenors (2 times 15,526)

55,307

Thus, at most, intervenors' present holdings could have represented only 57,209 common shares (55,307 plus 1,902 presently held half-paid shares) of the 250,000 common shares outstanding, or 22.88 percent of the common capital stock outstanding in 1942 (57,209/250,000).

2269

III

The Kaufmans make the surprising assertion that the defendants' affidavits do not show the total number of

shares of common stock or of preferred stock of I. G. Chemie *outstanding* in 1942 (Kaufman memorandum, p. 9, n. 3). But the same intervenors stated in May 1950 that "as of 1940, plaintiff's total outstanding capital stock of all classes was 350,000 shares".[2] As stated in the Jacoby affidavit, *supra*, there was no change in the capitalization or the number of shares outstanding between 1940 and the end of hostilities, and thus at vesting. See the Chemie balance sheets for 1941, 1942, and 1948, attached to the Jacoby affidavit, *supra*.

Moreover, by Article 659 of Chapter VI of the Swiss Code of Obligations of 1936, Chemie would have been prohibited from reacquiring its stock and thus reducing the number of shares outstanding, except in the special circumstances specified in Article 659. (Translation of Article 659 attached as Exhibit 2). That section of the Swiss Code requires that the acquisition and sales of treasury shares shall be reported in the reports of the corporation. No mention is made of any dealings in treasury stock in the Chemie reports attached to the Jacoby affidavit, *supra*. And significantly enough, when in 1949 Chemie obtained 22,000 shares of common treasury stock, by forfeiture, the item was prominently displayed in its balance sheet and mentioned in its annual report.

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[2] See Kaufman's reply to memoranda of plaintiff and defendants in opposition to motion of Eric G. Kaufman, et al. for leave to intervene, served on May 10, 1950. At p. 3 of the memorandum, the following statement appears:

"... As of 1940, plaintiff's total outstanding capital stock of all classes was 350,000 shares, distributed as follows:

				Fr.			Fr.
100000	Preferred shares	Nominal value	100 —	10,000,000	20% paid-up	—	2,000,000
140000	Original shares	Nominal value	500 —	70,000,000	100% paid-up	—	70,000,000
110000	Original shares	Nominal value	500 —	55,000,000	50%	—	27,500,000
350000	Shares and Votes		—	Fr. 135,000,000			Fr. 99,500,000"

(See the translation of Chemie's annual report for 1949, Chemie document B-150, attached hereto as Exhibit 3; see also translation of Chemie's annual report for 1954, filed by plaintiffs, pp. 2, 15-16).

IV

Assuming arguendo, that the intervenors are held to be entitled to their proportionate share of the present capital of Chemie, their share would still be less than 25 percent. The Chemie annual report for 1954 filed by plaintiff on March 12, 1957, shows that Chemie has issued a total of 293,416 shares of capital stock, consisting of 100,000 preferred, 166,000 fully-paid and 27,416 half-paid common shares.[3] 3,000 shares of forfeited stock are held by Chemie and are shown in the balance sheet. Accordingly, 290,416 shares are outstanding.

Measured by the present capitalization, the 41,683 shares presently held by the intervenors represent only 14.36 percent of Chemie's total present outstanding capital stock, and 21.89 percent of its outstanding common capital stock, as follows:

2271 41,683/290,416—14.36 percent, including preferred stock.

41,683/190,416—21.89 percent, excluding preferred stock.

V.

Since the bar date of March 31, 1954, defendants have served interrogatories on 2,488 Chemie stockholders who originally intervened in the action. Of these, 1,768 intervenors answered the interrogatories and 720 were dismissed for failure to answer. Supplemental interrogatories, directed to the particular facts of 111 individual cases, have also been served to date on intervenors hold-

[3] No changes in the capitalization are reported in the annual report for 1955. See the extract from Chemie's annual report for 1955 showing its balance sheet figures as of December 31, 1955, attached as Exhibit 4. Presumably, the 1954 and 1955 figures reflect its present capitalization.

ing 12,197 fully-paid and 1,266 half-paid Chemie common shares. In addition, defendants have made informal requests of counsel for further data in 135 cases. From the information thus obtained, defendants have cleared 529 intervening complaints of stockholders.

/s/ PAUL E. MCGRAW

Sworn to before me this 13th day of March, 1957.

/s/ ANNETTA WOLDAR,
Notary Public

(SEAL)

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EXHIBIT 1

Excerpt from Translation of Minutes of the Chemie General Meeting Held on March 5, 1949

Authentic Public Record

I, the undersigned, notary public at Basle, herewith certify that today I attended the

twenty-sixth extraordinary general meeting

of the stockholders of the

Internationale Industrie- und Handelsbeteiligungen A.G.

in the Schützenhaus [club-house of a rifle corps] in Basle in order to draw up this public record of the proceedings.

The president of the Verwaltungsrat [Advisory Board], Dr. Felix Iselin, presided. He ascertained that the meeting has been called according to the by-laws by registered letters of February 22, 1949 (February twenty-two, nineteen hundred forty-nine) and by publication in the Swiss Handelsamtsblatt [Official Trade Journal] No. 44 (forty-four). The proofs were on hand.

• • • • •

Subject 1: Report of the Advisory Board on the result of calling in of the 50% of the nominal value of

110,000 common stocks at Fr. 500 nominal, not paid in up to date.

The chairman reported that on the basis of the call on stock of the not paid 50% (fifty percent) of the nominal value of 110,000 (one hundred ten thousand) common stocks at Fr. 500 (five hundred Francs), dated November 23, 1948 (November twenty-three, nineteen hundred and forty-eight), and of a first reminder of January 3 (January three), of a second reminder of January 4 (January four), and of a third and last reminder of January 5, 1949 (January five, nineteen hundred and forty-nine), cash in the total amount of Fr. 7,118,500 (seven million one hundred eighteen thousand and five hundred francs) has been paid in for 28,474 (twenty-eight thousand and four hundred seventy-four) till the expiration of the pro-
2273 longation of time of February 10, 1949 (February ten, nineteen hundred and forty-nine) respectively of the publication of the invalidation of February 12, 1949 (February twelve, nineteen hundred and forty-nine). Furthermore, 31,052 (thirty-one thousand and fifty-two) stock titles have been submitted for reduction of capital stock till February 10, 1949 (February ten, nineteen hundred and forty-nine). Since neither cash payment has been made for 23,058 (twenty-three thousand fifty-eight) stocks, nor a reduction offer has been made in due course or in a legal form, these stocks have been declared forfeited. Finally 27,416 (twenty-seven thousand and four hundred sixteen) stocks are affected by the order of the United States District Court for the District of Columbia as of February 3, 1949 (February three, nineteen hundred forty-nine). It will be reverted back to this order under subject 3 (three).

There was no discussion concerning this information.

Subject 2: Ascertainment of the achieved full payment.

The chairman remarked that according to the just mentioned information, cash payment in the amount of Fr. 7,118,500 (seven million one hundred eighteen thousand

and five hundred francs) has been made for 28,474 (twenty-eight thousand four hundred and seventy-four) stocks. The amount of half of the 31,052 (thirty-one thousand fifty-two) stocks at Fr. 250 (two hundred fifty francs), submitted for reduction of capital stock, therefore of 15,526 (fifteen thousand five hundred twenty-six) stocks at Fr. 250 (two hundred fifty francs), a total of Fr. 3,881,500 (three million eight hundred eighty-one thousand five hundred francs) has to be added. These amounts show a payment in full of

Francs 7,118,500 from cash payment,
Francs 3,881,500 from reduction of capital stock

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therefore total Francs 11,000,000 (eleven million francs).

2274 According to confirmations of the Schweizerischer Bankverein in Basle, the Schweizerische Kreditanstalt in Zurich, the Schweizerische Bankgesellschaft in Zurich, and Messrs. H. Sturzenegger & Cie. in Basle, presented in the general meeting, this amount is deposited at these firms and is at the disposal of the corporation.

2275

Translation of Article 659, Chapter VI, of the Swiss Code of Obligations of 1936

EXHIBIT 2

VI. THE ACQUISITION OF THE TREASURY STOCK

Art. 659. A corporation shall not acquire its own shares either for its portfolio or as security.

These regulations are not applicable:

1. When the shares are acquired following a resolution which provides for the reduction of the capital stock;

2. When the shares are acquired to satisfy claims of the corporation provided these claims do not originate in the subscription for its capital stock;

3. When the shares are transferred to the corporation in consequence of the acquisition of certain assets, or of an enterprise with its assets and liabilities;

4. When the acquisition of the shares or their taking as security is connected with the management of an enterprise affiliated to the corporation according to its by-laws;

5. When the members of the board, managers and employees of the corporation deposit the shares as security for the fulfilment of their respective duties.

The shares acquired for the portfolio must be destroyed immediately, in the case under 1; in the other cases, they must be disposed of with expedient acceleration.

The acquisition and sales of the treasury shares shall be reported in the reports of the corporation.

The shares acquired by the corporation shall not be represented at the annual meeting of the corporation.

2276 EXHIBIT 3

Report

of the administration of the

INTERNATIONALE INDUSTRIE- & HANDELSBETEILIGUNGEN A.G.
SOCIETE INTERNATIONALE POUR PARTICIPATIONS INDUSTRIELLES ET COMMERCIALES S.A.

BASLE

to the

ordinary General Meeting of the shareholders
of 29th April, 1950

for the business year 1949

We have the honour of presenting to you the report for the twenty-second business year of our company.

The year 1949 has brought no improvement for the defence of legal claims against foreign sequestration authorities. The offices in question still seem to consider it their main duty to dispute with all the means at their disposal demands for the return of vested properties. Where the traditional laws are not sufficient for this, attempts are made to create new law of expediency in order to permit the retention of vested property even in cases where, five years after termination of the hostilities, it has not been possible to prove the so-called enemy property or enemy control asserted at that time as pretext for the vesting.

In the sphere of international law too the necessity to fulfill obligations once entered into seems to be regarded by many countries from the point of view of whether the financial or other economic advantage outweighs the burden assumed. This is seen in a particularly crass manner in the questions which should have been resolved by the Washington Accord of 1946. Where this accord serves the interests of the participating Allied countries, pressure is brought to bear for its fulfillment; where performance is provided for on their side or where such performance would be necessary in order to make possible the fulfillment of the agreements according to their meaning, attempts are made to dispute the applicability. In these circumstances the task of the representatives of the Swiss government, who have to represent Swiss interests in general and thus those of our company as well, is an extremely difficult one.

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We would again like to take this opportunity to express our sincere thanks to the authorities and officials who have given us their support in our struggle.

The balance-sheet for 31st December, 1949, shews in its basic structure those changes which resulted from the capital simplification transaction concluded at the beginning of the business year.

The unpaid share capital stands unchanged at 80% of the nominal value of Frs. 10,000,000.— of the preferred shares, thus Frs. 8,000,000.—. On the other hand, the unpaid amount of the 50% paid up common shares has decreased from Frs. 27,500,000.— in the previous year to Frs. 6,854,000.—. These 50% paid up common shares are the 27,416 units which were affected by the order of the United States District Court for the District of Columbia of 3rd February, 1949. The administration is still of the opinion that this order is contrary to Swiss legal conceptions, both from the material and procedural points of view, is unfounded and moreover represents an encroachment on Swiss jurisdiction by the American judge. Unfortunately the appeal which we filed against the order of the judge of first instance was dismissed on 13th February, 1950, by the United States Court of Appeals for the District of Columbia, so that we are still constrained to continue to live up to the order.

For the first time there appear in the balance-sheet Frs. 11,000,000.—nominal value = 22,000 units of our own shares at a book value of Frs. 250.—per unit = Frs. 5,500,000.— Of these shares, 3,000 units are reserved for cases of hardship according to the resolution of the general meeting of 5th March, 1949, while 19,000 units can
2278 either be used for a further capital reduction or can be re-issued for account of the company. The administration has considered it better up to the present to postpone the formation of resolutions both in respect of the 3,000 units and also of the 19,000 units.

The amount of our participations and securities has increased by Frs. 6,111,514.30 to Frs. 173,530,933.89.

The debtors have increased from Frs. 5,275,444.85 to Frs. 5,788,381.31. As previously, these are exclusively internal claims.

The freely disposable bank balances, of which Frs. 5,350,000.— (Frs. 6,850,000.— the previous year) are short-term, fixed-time deposits with Swiss banks, amount to Frs.

10,007,577.31 compared with Frs. 9,332,458.62 the previous year. The counter-value of the bank balances blocked in the U.S.A., which are still completely covered by reserves under creditors, amounts unchanged to Frs. 4,586,455.85.

This year too we give in the following survey the geographical distribution of the balance value of the assets, whereby the unpaid share capital, the own shares declared forfeit and the completely covered blocked bank balances are not included.

Switzerland:		
Securities and participations	13,10%	
Debtors	3,06%	
Bank balances	5,28%	21,44%
U. S. A.		75,89%
Norway		2,39%
Other countries		0,28%
		100,00%

The greater part of the assets in Switerland, besides bank balances and debtors, is mainly composed, as formerly, of fixed-interest assets and other marketable securities which were acquired from the point of view of a proper distribution of risk.

2279 The engagement in the U.S.A. still consists exclusively of the participation in the General Aniline & Film Corporation, New York, that in Norway of shares of the Norsk Hydro-Elektrisk Kvaelstofaktieselskab, Oslo.

Among the liabilities there appear under share capital the preferred shares unchanged at Frs. 10,000,000.— while the common shares increased from Frs. 70,000,000.— nominal value fully paid common shares to Frs. 103,000,-000.—nominal value fully paid common shares and the 50% paid up common shares decreased from Frs. 55,-000,000.—nominal value to Frs. 13,708,000.—nominal value.

The reserve fund increased from Frs. 79,400,000.—to Frs. 79,664,500.—by allocation to it of the forfeiture profit

on 1,058 shares declared forfeit, which have not been reissued, to the sum of Frs. 264,500.—.

The creditors have increased from Frs. 6,012,514.32 to Frs. 6,183,836.44.

Our participation in the General Aniline & Film Corporation, New York, is still removed from our disposition in consequence of the vesting by the U.S. Department of Justice, Office of Alien Property.

In lack of a reliable new basis of valuation we have again retained the previous method of balancing and have refrained from making a new valuation.

The year 1949 was characterized by extensive preparatory work and pretrial activities concerning the action which we had instituted through the filing of suit for return of our vested property on 21st October, 1948, against the Attorney General of the U.S.A. In this suit we are in the stage of discovery depositions and mutual inspection of documents.

Our controversy with the U.S. Department of Justice and particularly the negotiations carried on with this government agency to explore the possibilities of a settlement, were greatly obstructed in summer 1949 by the attempt of the firm Remington Rand Inc. to enter the
2280 suit. Remington's aim was to prevent a settlement between the Justice Department and ourselves in order to be able to interpose itself in the negotiations. On the basis of its allegation that in the years 1946 and 1947 it had held an option from us to purchase the General Aniline & Film Corporation and had exercised it at the proper time, Remington was at first admitted as intervenor. We denied that we ever granted Remington an option and after the recently held material trial the court decided in our favour in first instance.

In spite of this obstacle which, because of the possibility of appeal open to Remington, has not yet been completely removed, the negotiations to procure a settlement are con-

tinuing. We regret to have to establish, however, that the U.S. Department of Justice is attempting to impose conditions on us which have no relation to our legitimate claims.

The annual report of the General Aniline & Film Corporation, New York, for the year 1949, is not yet at our disposal. As soon as it is available to us we will again have it sent to our shareholders on request. It can be seen from the balance figures published that in the year 1949 the company worked much less satisfactorily than in the previous year. The sales fell from $91.0 millions to $80.3 millions. The costs, on the other hand, only sank from $82.4 millions to $77.4 millions, so that there results a net income of $2.9 millions compared with $8.6 millions in the previous year.

The earnings per A-share amounted to $3.99 in the year 1949 ($11.74 the previous year). No dividends were declared in 1949 either.

The Norsk Hydro-Elektrisk Kvaelstofaktieselskab, Oslo, in which we have an unchanged participation of ca. 10% of its common share capital, declared an unchanged dividend for 1948/49 of 5% on the common shares.

Unfortunately the blocking of our property continues in Norway as well. In the suit instituted by us complaint and answer were filed with the competent court. Negotiations which should prepare for a settlement have been under way for sometime with the Norwegian government too.

We have kept to the former balancing for this participation too and in view of the lack of a reliable basis of valuation have refrained from undertaking a new valuation.

2281 . Taking into consideration the profit carried forward from the previous year, there results a balance of the profit-and-loss account of Frs. 1,711,011.92.

The auditing of the accounts prescribed by Art. 723 of the Obligation Law was done by a trustee company.

2282 We submit to the vote of the general meeting the following

PROPOSALS:

1. Approval of the balance-sheet with profit-and-loss account for 31st December, 1949.

2. Discharge of the administration.

3. Payment of the 6% cumulative dividends assured by the articles to the sum of Frs. 120,000.— on the 20% paid up preferred shares, payable from 2nd May, 1950, and the carrying forward of the remaining profit balance to the sum of Frs. 1,591,001.92 onto new account.

4. Elections.

Basle, April 1950.

THE ADMINISTRATION

2283

BALANCE TO 31st DECEMBER, 1949

Assets		*Fr.*	*Cts.*
Unpaid share capital:			
Preferred shares:			
80% on Fr.10,000,000.—	Fr.8,000,000.		
Common shares:			
50% on Fr.13,708,000.—	Fr.6,854,000.	14,854,000	—
Own shares declared forfeit		5,500,000	—
Participations and securities		173,530,933	89
Debtors		5,788,381	31
Bank balances: freely disposable		10,007,577	31
blocked		4,586,455	85
		214,267,348	36

BALANCE TO 31st DECEMBER, 1949

2284

Liabilities		*Fr.*	*Cts.*
Share capital:			
Preferred shares:			
20% paid	Fr.10,000,000.—		
Common shares:			
fully paid	Fr.103,000,000.—		
50% paid	Fr. 13,708,000.—	126,708,000	—
Reserve funds		79,664,500	—
Creditors		6,183,836	44
Net proceeds from the profit-and-loss account		1,711,011	92
		214,267,348	36

PROFIT- AND- LOSS ACCOUNT FOR THE YEAR 1949

Debit	*Fr.*	*Cts.*
Expenses and taxes	1,106,803	41
Net profit	1,711,011	92
	2,817,815	33

PROFIT- AND- LOSS ACCOUNT FOR THE YEAR 1949

Credit	*Fr.*	*Cts.*
Balance from previous year	1,581,264	59
Gross earnings	1,236,550	74
	2,817,815	33

2285

AUDITORS' REPORT

Basle, 14th April, 1950.

To the ordinary general meeting of the shareholders of the
INTERNATIONALE INDUSTRIE- & HANDELSBETEILIGUNGEN A.G.
Basle

Gentlemen,

In execution of the task entrusted to us we have examined the annual balance-sheet closed on 31st December, 1949.

We established that the figures of the balance-sheet for 31st December, 1949, which is closed on both sides with Frs. 214,267,348.36, as well as the accompanying profit-and-loss account shewing a profit balance of Frs. 1,711,-011.92, result from the properly kept books of the company.

The presentation of the property situation by the annual report submitted corresponds to the legal prescriptions. With regard to the valuation of the participation in the General Aniline & Film Corporation, New York, and in the Norsk Hydro-Elektrisk Kvaelstofaktieselskab, Oslo, we refer explicitly to the statements in the annual report of the board of directors. Proof of the position of the bank balances and securities was given us by extracts of account and deposit receipts.

The profit-and-loss account correctly reflects the results of business so that on the basis of our examination we can propose to you the adoption of the annual balance-sheet and the approval of the proposals of the board of directors regarding the utilization of the business yield.

Yours truly,

J. WECKEMANN FREY

2286

EXHIBIT 4

INTERNATIONALE INDUSTRIE- & HANDELSBETEILIGUNGEN A.G.
SOCIETE INTERNATIONALE POUR PARTICIPATIONS INDUSTRIELLES ET COMMERCIALES S.A.

IN

BASLE

TWENTY-EIGHTH ANNUAL REPORT 1955.

2287

BOARD OF DIRECTORS

Dr. Felix Iselin, President, Basle
August Germann, Zurich
Walter Germann, Manager, Basle
Dr. Charles H. Gossweiler, Bern
Dr. Hans Pestalozzi, Zurich
Charles Rudolph, Zurich (left)
Dr. Hans Sturzenegger, Basle
Dr. Friedrich von Tscharner, Basle

MANAGEMENT

Walter Germann, Manager, Basle
Dr. Max Ott, Manager, Basle
Dr. Erich Schmitt, Assistant Manager, Basle

AUDITORS

Joseph Weckemann, Zurich
Maria Duppenthaler, Schaffhausen

SUBSTITUTES

Basil Werder, Basle
Hans Lamprecht, Zurich

2288

Report

of the administration of the

Internationale Industrie- & Handelsbeteiligungen A.G. Societe Internationale pour Participations Industrielles et Commerciales S.A.

Basle

to the

ordinary general meeting of the shareholders on 28th March, 1956

for the business year 1955.

The year 1955 was unfortunately still overcast by the hard struggle for the release of our assets vested abroad. This struggle, now as before, casts a shadow on the normal business activity, as even today, more than ten years after the end of World War II, the main part of our assets is still vested. Our efforts for the release of our vested assets find encouragement again and again, because the principles for which we fight belong to the real basis of western civilization which have been neglected at times during the war and could be disregarded at decisions of expediency of the big powers in the pre-war years, but which must again be respected if the free world wants to be loyal to its fundamental dogma. It is significant that many smaller states—even such, which during the war had to suffer most—have found their way back to clear principles of the international law, whereas in various big nations power predominates justice even in relation to neutral countries.

2289 The balance-sheet per 31st December, 1955, shows under assets the unpaid share capital unchanged at

Frs. 14,854,000.—. This amount is made up as follows: Frs. 8,000,000.— unpaid amount of 80% on Frs. 10,000,-000.— nominal preferred shares, and Frs. 6,854,000.— unpaid amount on the Frs. 13,708,000.— 50% paid up common shares. As you know, these 50% paid up common shares are the 27,416 units affected by the order of the United States District Court for the District of Columbia of 3rd February, 1949. We are still of the opinion that this order is contrary to Swiss legal concepts both from the material and procedural points of view, that it is unfounded and, moreover, represents an encroachment on Swiss jurisdiction by the American judge.

The own shares declared forfeit are shown, as in previous years, at Frs. 750,000.—. The corresponding 3000 shares remain in reserve for cases of hardship in accordance with the resolution of the general meeting of 5th March, 1949. The board of directors still thinks it right for the examination of applications for consideration as cases of hardship to be postponed until our company has obtained justice in its controversy in the U.S.A.

The position of our participations and securities has increased from Frs. 166,424,883.60 by Frs. 3,090,395.35 to Frs. 169,515,278.95. The increase is mainly due to the conversion of liabilities into share capital in connection with the rationalization of the Cilag A.G., Schaffhausen.

2290 The freely disposable bank balances amount to frs. 855,354.35. Compared with the balance of the previous year, they have decreased from frs. 1,758,879.53 by frs. 903,528.18. Bank balances subject to transfer are shown at frs. 19,394.45. The bank balances blocked in the U.S.A. are shown unchanged at frs. 4,586,455.85. This amount is still fully covered by reserves under creditors.

We are giving you, as in previous years, a survey of the geographical distribution of the balance value of the assets, from which are omitted the unpaid share capital,

the own shares declared forfeit and the blocked bank balances fully covered by reserves:

Switzerland:		
Securities and participations	8,46%	
Debtors	6,60%	
Bank balances	0,47%	15,53%
U. S. A.		82,77%
Other countries		1,70%
		100,00%

The engagement in the U.S.A. still consists exclusively of the participation in the General Aniline & Film Corporation, New York.

Among liabilities there appear under share capital the preferred shares without any change at frs. 10,000,000.—, while the 100% paid up common shares are shown at frs. 83,000,000.— and the 50% paid up common shares at frs. 13,708,000.—.

The reserve fund stands also per 31st December, 1955 at frs. 84,414,500.—.

2291

BALANCE-SHEET TO 31st DECEMBER, 1955

Assets		*Frs.*	*Cts.*
Unpaid share capital			
Preferred shares			
80% on frs. 10,000,000.—	frs. 8,000,000.		
Common shares			
50% on frs. 13,708,000.—	frs. 6,854,000.	14,854,000.—	
Own shares declared forfeit		750,000.—	
Participations and securities		169,515,278.95	
Debtors		12,219,562.71	
Bank balances: freely disposable		855,354.35	
subject to transfer		19,394.45	
blocked (U.S.A.)		4,586,455.85	
		202,900,046.31	

2292

BALANCE-SHEET TO 31st DECEMBER, 1955

Liabilities

		Frs.	*Cts.*
Share capital:			
Preferred shares:			
20% paid up	frs. 10,000,000.—		
Common shares:			
100% paid up	frs. 83,000,000.—		
50% paid up	frs. 13,708,000.—	106,708,000.—	
Reserve funds		84,414,500.—	
Creditors		10,021,846.13	
Net proceeds from the profit-and-loss account		1,755,700.18	
		202,900,046.31	

2293 Filed March 13, 1957

Affidavit of John J. Wilson In Support of Motions For Enforcement Order

DISTRICT OF COLUMBIA, SS:

I, **John J. Wilson,** being first duly sworn, on oath depose and state that I am one of the attorneys of record for the plaintiff corporation, and that I have received from our client its annual report for the year 1954, both in German text and an English translation; and that I hereby identify the two documents attached to this affidavit as the German text and an English translation of said report as received by me from our client.

/s/ JOHN J. WILSON

Subscribed and sworn to before me this 12th day of March, 1957.

VERA MC. G. SIMPSON
Notary Public, D. C.

2313

Internationale Industrie- & Handelsbeteiligungen A.G.
Societe Internationale pour Participations Industrielles et Commerciales S.A.

in

Basle

TWENTY-SEVENTH ANNUAL REPORT 1954

2314

Board of Directors

Dr. Felix Iselin, President, Basle
August Germann, Zurich
Walter Germann, Manager, Basle
Dr. Alfred Keller, Brugg
Dr. Hans Pestalozzi, Zurich
Charles Rudolph, Zurich
Dr. Hans Sturzenegger, Basle
Dr. Friedrich von Tscharner, Basle

Management

Walter Germann, Manager, Basle
Dr. Max Ott, Manager, Basle
Dr. Erich Schmitt, Assistant Manager, Basle

Auditors

Joseph Weckemann, Zurich
Maria Duppenthaler, Schaffhausen

Substitutes

Basil Werder, Basle
Hans Lamprecht, Zurich

2315. REPORT

of the administration of the

INTERNATIONALE INDUSTRIE- & HANDELSBETEILIGUNGEN A.G.
SOCIETE INTERNATIONALE POUR PARTICIPATIONS INDUSTRIELLES ET COMMERCIALES S.A.

BASLE

to the

ordinary general meeting of the shareholders on 4th July, 1955,

for the business year 1954

The struggle for the release of our assets vested abroad was still our main task in the year covered by the report. This problem still demanded our unremitting attention. On one hand, it was obvious that wider and wider circles were convinced of the indefensibility of the vesting of private assets—particularly those of neutrals—and are insisting on a return to the most important legal principles of the free world. On the other hand, however, we are again and again surprised to see how cynically the circles which have a direct interest in the administration of our vested assets—and which are in reality functioning as trustees for foreign property and should think accordingly—cling to long refuted imputations and suspicions and are thus actively following a policy contrary to the tendencies towards release, which is inconsistent with their functions as trustees. However, we are convinced that these obstacles can, in the long run, notwithstand plain justice and that the fairness of the nations concerned will at last bring these to recognize the justification of the demands which we have been urging for years.

2316 The balance-sheet per 31st December, 1954, shews under assets the unpaid share capital unchanged at

Frs. 14,854,000.—. Of this, Frs. 8,000,000.— is the unpaid amount of 80% on Frs. 10,000,000.— nominal preferred shares, whereas Frs. 6,854,000.— is the unpaid amount on the Frs. 13,708,000.— 50% paid up common shares. As you know, these 50% paid up common shares are the 27,416 units affected by the order of the United States District Court for the District of Columbia of 3rd February, 1949. We are still of the opinion that this order is contrary to Swiss legal concepts both from the material and procedural points of view, that it is unfounded and, moreover, represents an encroachment on Swiss jurisdiction by the American judge.

The own shares declared forfeit are shewn unchanged at Frs. 750,000.—. The corresponding 3000 shares remain in reserve for cases of hardship in accordance with the resolution of the general meeting of 5th March, 1949. The board of directors still thinks it right for the examination of application for consideration as cases of hardship to be postponed until our company has obtained justice in its controversy in the U.S.A.

The position of our participations and securities has decreased from Frs. 166,476,131.30 by Frs. 51,247.70 to Frs. 166,424,883.60.

The following information* can be given about the main firms (in alphabetical order) in which we hold participations:

2317 *Aussenhandel A.G., Zurich.*

The Aussenhandel A.G., Zurich, has a capital of Frs. 1,000,000.—in which we hold a minority participation. Its purpose is the import, export and transit of and trading in goods of all types, commission deals and participation in similar undertakings. The Aussenhandel A.G. has mainly carried out switch deals and in particular it has

* Further details, especially with regard to the origin and development of our main participations, will be given at the general meeting in a special report.

made available its knowledge and contacts on a commission basis for carrying out compensation transactions and liquidating assets subject to transfer. It started its business activity in mid-1952. A dividend of 5% was declared for each of the business years 1953 and 1954.

Bank Hofmann A.G., Zurich.

On 31st December, 1954, we held a right of option on a minority of the share capital of the Bank Hofmann A.G. which amounts to Frs. 2,000,000.—. Since a deposit was set up at that time for this option this is already included in our balance-sheet under 'participations'. Since that time we have exercised the option. The Bank Hofmann A.G. is developing well. In the last two years it has paid a dividend of 8%. We received the 1954 dividend.

Cilag, Aktiengesellschaft, Schaffhausen.

We have a majority participation as stockholder and creditor in Cilag in Schaffhausen. With regard to the development of our participation we refer you particularly to the statements at our coming general meeting and to the special report which will be distributed there. During the past year we have found ourselves faced with the difficult question of whether we want to support an int resting, extensive expansion programme which 2318 would have required the investment of further and even larger resources. We could not decide to agree to this project and took the attitude that a different arrangement should be made. Various attempts have been made to solve the difficult problems connected with this and negotiations have also been carried on about the relinquishment of our participation and our credit. These latter negotiations have so far not been successful.

Three conditions must be fulfilled for the continuation of the business:

1) A thorough reorganization of the works would have to be made in the sense of saving on overheads. The business in chemicals—which has had a deficit so far—

would have to be given up and the main weight laid upon developing specialities.

2) We would have to endeavour to obtain an association with another chemical firm whose advice and experience would be at Cilag's disposal for technical, commercial and organizational questions.

3) The circles of stockholders bringing in new capital would have to be extended.

The reorganization is under way. The second condition, cooperation with a recognized chemical firm, seems to be assured. There are prospects that further circles will invest in the company so that we shall no longer have to bear the burden of development alone.—It must not be overlooked that Cilag is still a relatively young firm and that p' cisely in chemical firms of the pharmaceutical branch ousiness develops slowly since the introduction of new products requires time and money.

It must therefore be calculated that in the proposed rationalization the share capital will have to be written off as lost and it will scarcely be possible to avoid it being necessary for the main investors to waive a part of their claims.

2319 As far as our company is concerned, it may be said that the share participation has been written off to Frs. 1.— and that the balance-sheet contains a special reserve fund which will cover the capital loss on the claims. Thus the sacrifice which we have to make should scarcely have any further effects upon the balance-sheet.

Internationale Gesellschaft der Stickstoffindustrie A.G., Basle.

The company served as trustee and paying office for the nitrogen producers who were formerly associated in the International Nitrogen Convention. Since this association disappeared because of the state of war the company only retains liquidation functions. We hold a minority

of the capital. The shares are 20% paid up and should represent their full value since besides the assets in trust the company's own assets consist of first class securities and bank balances.

Participations in syndicates.

We have a 90% participation in a syndicate whose assets are at present composed of securities, participations and bank balances. Our participation in the Egyptian Oil Consortium Inc., Panama, to the sum of ca. $600,000.—, is also contained in this syndicate. Together with the Belgian Compagnie Financiere Belge des Petroles (Petrofina) and the Italian Societa Azionaria Imprese Perforazioni (S.A.I.P.) this partnership holds the controlling parcel of shares in the International Egyptian Oil Company Inc., Panama. This participation has become very valuable since profitable wells have been drilled to an extent which exceeds our expectations.

The bank balances and securities of the syndicate which are at present blocked and vested abroad are shewn at one franc, but it is to be hoped that the greater part of these assets will become free within a foreseeable time. In some countries we have already obtained release.

2320

Our participation in this syndicate includes a considerable passive reserve fund, without taking into consideration the oil investment and the last mentioned blocked items.

In a further syndicate we have a two thirds participation. This syndicate owns 50% of the real estate and managing company of the Hotel Crillon in Lima, Peru, and 50% of the real estate and management of a department store in the same town. The firms are working satisfactorily and the real estate has increased in value. Both firms have been able to make payments to the participants from their earnings.

Luxor Aktiengesellschaft, Zurich.

The Luxor Aktiengesellschaft, Zurich, owns the building in which the Luxor Cinema is run. The share capital amounts to Frs. 250,000.—. We have a 50% participation in this. The dividend for 1953 amounted to 4%. This is a real estate company whose receipts are to a certain extent dependent upon the development of the cinema since the company participates in the turnover.

Osmon A.G., Schaffhausen.

We own 100% of the Osmon A.G., Schaffhausen. The share capital is Frs. 2,000,000.—. The assets mainly consist of securities and debtors. Among the securities there are bonds of the Swiss Confederation, a promissory note on some real estate in Zurich and shares of 4 real estate companies, of which two were disposed of at a profit in the course of the year 1954. The shares of the two other real estate companies have retained their full value.

2321. Interesting groups of buildings in the centre of the City of Zurich belong to these companies. Furthermore, Osmen has granted loans to companies closely connected with it. Even if one or the other of the credits which Osmon has granted has not maintained its value it must be taken into consideration, on the other hand, that in our balance-sheet the share capital of Osmon A.G. is valued at only 50%.

Osmon also owns the majority of the share capital of Turikop A.G., Zurich, which amounts to Frs. 450,000.—; this is a film copying institute to which a soundtrack studio is attached. Turikop is working satisfactorily and shews a balanced profit- and-loss account. It has very modern installations for the copying and development of films and has interesting permanent clients. The following companies belong to the Turikop circle:

Cinetechnik A.G., Zurich: a research and development company in the technical branch of the film industry.

Filmstudio Bellerive A.G., Zurich: a company for running the film studio behind the Hotel Bellerive in Zurich which is at present being used for the Zurich Fernseh-Versuchsbetrieb (Zurich Experimental Television Studio).

Gloria Film A.G.: a company for the production of recreationary, documentary and commissioned film.

Rex Film A.G.: a company for the marketing of films in Switzerland.

Union Film A.G.: a company for the marketing of films abroad.

Societe Industrielle de St-Maur, Paris: a film copying institute and soundtrack studio.

2322 *Aktiengesellschaft fur Industrie und Handel, Frankfurt a/M.*

We own 100% of the Aktiengesellschaft fur Industrie und Handel. It has a share capital of DM. 1,000,000.—. It will be seen from the special report why this company was founded. It was an intermediate solution before we again had the Westdeutsche Handelsbank A.G. at our absolute disposal. The company has a limited activity. Its business is proceeding regularly and its shares may be considered to represent their full value. It owns a large portfolio of German shares which have increased in value.

Westdeutsche Handelsbank A.G., Frankfurt a/M.

We own the majority of the share capital of the Westdeutsche Handelsbank A.G. The Westdeutsche Handelsbank A.G., formerly Deutsche Landerbank A.G., has not yet been able to convert its balance-sheet to the DM currency because it has not yet been possible to settle various important questions. Compared with the inventory value, the value of our participation contains a reserve fund of several millions.

Various negotiable securities.

Among the securities there are bonds for Frs. 1,735,-000.—. These are first class bonds issued by the Swiss Confederation and by banks and also a first class bearer prom-

issory note. We also hold a large parcel of quoted shares in first rate Swiss firms, mainly banks and industrial firms which could be realized at any time without difficulty.

2323 Compared with the current value per 31st December, 1954, our inventory value shews a large passive reserve fund worth several millions.

The debtors have increased from Frs. 12,384,601.55 to Frs. 15,226,582.61. The most important items consist mainly of credits to the Cilag Aktiengesellschaft, to the two rea. estate companies and to Turikop A.G. and to the Osmon Aktiengesellschaft.

The freely disposable bank balances amount to Frs. 1,758,879.53 compared with Frs. 1,613,250.78 the previous year. Bank balances subject to transfer are shewn at the counter-value of Frs. 18,974.75. The bank balances blocked in the U.S.A. to the sum of Frs. 4,586,455.85 are still covered by reserves under ereditors.

The following survey gives you, as in previous years, the geographical distribution of the balance value of the assets, from which are omitted the unpaid share capital, the own shares declared forfeit and the blocked bank balances fully covered by reserves:

Switzerland:		
Securities and participations	6.74%	
Debtors	8.26%	
Bank balances	0.96%	15.96%
U. S. A.		82.44%
Other countries		1.60%
		100.00%

2324 The engagement in the U.S.A. still consists exclusively of the participation in the General Aniline & Film Corporation, New York.

Among liabilities there appear under *share capital* the preferred shares without any change at Frs. 10,000,000.—, while the 100% paid up common shares are shewn at Frs.

83,000,000.— and the 50% paid up common shares at Frs. 13,708,000.—.

The reserve fund stands unchanged at Frs. 84,414,500.—.

The creditors have increased from Frs. 8,021,845.73 to Frs. 10,794,584.03. This item consists mainly of special reserves.

Our participation in the General Aniline & Film Corporation, New York, is still subject to the vesting order of the Department of Justice, Office of Alien Property.

Because of the lack of any reliable basis of valuation we have again refrained from making any new valuation but have retained the previous balancing.

In the year covered by the report there arose a serious crisis in our suit in the U.S.A. for the return of our vested assets. The judge of the court of first instance, the U.S. District Court for the District of Columbia in Washington, had demanded of us, as you know, besides the production of our own books and records, also the production of all the records of a Swiss bank—not only those relating to our matter. Because of a conflict between the order of the American judge and Swiss law, which had also engaged the attention of the Federal Council, it was not possible for us to comply fully with the order within the term set by the judge although we had succeeded in obtaining the release, with the consent of the bank, of a large
2325 number of the documents demanded. In spite of this Judge Laws of the U.S. District Court for the District of Columbia decided, in an opinion which he himself described as an innovation in American procedure, that our suit for the return of our assets should be dismissed as a procedural and formal sanction. This took place before the material suit ever came before the court and contrary to the clear recommendations contained in the expert opinion of the Special Master appointed by Judge Laws himself, who had carried out the whole of the investigations, hearings and negotiations in this matter on behalf of the judge. As we have already announced, an

appeal was filed with the competent U.S. Court of Appeals for the District of Columbia against the decision of the court of first instance. In the course of the year covered by the report the appeal briefs were filed with the court and the verbal hearings took place in autumn 1954. At the time of writing this report the decision of the appeal court was still outstanding.

In 1954 too the efforts to achieve a solution with the American Government were continued. In particular, on Berne's instructions the Swiss Legation in Washington strove—as has since been seen from the official reports—for the resumption of talks with U.S. government agencies but this matter was handled in a dilatory fashion by the latter.

In the field of legislation in the American Congress our task mainly consisted of stressing in the hearings held before the Senate Sub-Committee on the Trading with the Enemy Act, a sub-committee of the Committee on the Judiciary which decides these questions, the Swiss character of our company and in refuting in this way the imputations and frivolous allegations about enemy 'taint' made by our opponents before the same forum. Besides this, it was also convincingly demonstrated by our attorney

that a pending draft bill which would give the
2326 Justice Department the possibility of selling our assets while our suit is still pending would violate the American Constitution.

Unfortunately from the annual report of the General Aniline & Film Corporation, New York, for the year 1954 there results a very unsatisfactory development of the business outcome. On a turnover of $104.9 millions compared with $109.6 millions the previous year the net yield fell from $3.0 millions to $2.5 millions, or from 3.71 to $3.16 per A share.

The profit-and-loss account again shews heavy expenses for the year 1954 which are caused mainly by the defence of our interests in the U.S.A. and chiefly by the litigation.

The net profit for 1954 amounts to Frs. 31,430.11. Compared with the gross earnings of Frs. 2,165,630.01 the expense account shews a balance of Frs. 2,134,199.90. It was only possible to achieve this balance after deduction of a sum of Frs. 700,000.— from special reserves but it was possible to re-endow these with Frs. 672,003.— from exceptional receipts which are not contained in the gross receipts.

It is proposed that the balance of the profit-and-loss account of Frs. 31,430.11, together with the balance from the previous year of Frs. 1,671,262.20, that is a total of Frs. 1,702,692.31, should be carried forward to new account. Once again we find ourselves forced to propose to the general meeting that the payment of the 6% cumulative dividend guaranteed in the by-laws to the sum of Frs. 120,000.— on the 20% paid preferred shares should be deferred.

2327 It is to be regretted that Dr. Alfred Keller who has been a member of our board of directors for many years, finds himself forced to hand in his resignation as a director of our company for reasons of health. We regret this decision greatly. Dr. Keller has been a member of our board since 22nd July, 1946. We would like to offer Dr. Alfred Keller our hearty thanks for the exceptional services which he has rendered the company with his personality and his great knowledge. We wish him a good recovery and shall always remember the collaboration with him with great pleasure.

A substitute is to be elected to the board of directors in place of Dr. Alfred Keller.

2328 We submit to the vote of the general meeting the following

PROPOSALS:

1. Approval of the balance-sheet with profit- and -loss account for 31st December, 1954.
2. Discharge of the administration.
3. Carrying over to new account of the remaining asset-balance to the sum of Frs, 1,702,692.31.
4. Election of a substitute to the board.

Basle, June 1955.

THE ADMINISTRATION.

2329

BALANCE-SHEET TO 31st DECEMBER, 1954

Assets		*Frs.*	*Cts.*
Unpaid share capital			
Preferred shares			
80% on Frs. 10,000,000.	Frs. 8,000,000.		
Common shares			
50% on Frs. 13,708,000.	Frs. 6,854,000.	14,854,000.—	
Own shares declared forfeit		750,000.—	
Participations and securities		166,424,883.60	
Debtors		15,226,582.61	
Bank balances: freely disposable		1,758,879.53	
subject to transfer		18,974.75	
blocked (U.S.A.)		4,586,455.85	
		203,619,776.34	

2330

Liabilities		*Frs.*	*Cts.*
Share capital:			
Preferred shares:			
20% paid up	Frs. 10,000,000.—		
Common shares:			
100% paid up	Frs. 83,000,000.—		
50% paid up	Frs. 13,708,000.—	106,708,000.—	

Reserve funds	84,414,500.—
Creditors	10,794,584.03
Net proceeds from the profit-and-loss account	1,702,692.31
	203,619,776.34

2331

PROFIT- AND- LOSS ACCOUNT FOR THE YEAR 1954

Debit	*Frs.*	*Cts.*
Expenses and taxes	2,134,199.90	
Net profit	1,702,692.31	
	3,836,892.21	

2333

	Frs.	*Cts.*
Balance from previous year	1,671,262.20	
Gross earnings	2,165,630.01	
	3,836,892.21	

2339

AUDITORS' REPORT

Basle, 23rd May, 1955.

To the ordinary general meeting of the shareholders of the Internationale Industrie- & Handelsbeteiligungen A.G.,

Basle

Gentlemen,

In execution of the task entrusted to us we have examined the annual balance-sheet closed on 31st December, 1954.

We established that the figures of the balance-sheet for 31st December, 1954, which is closed on both sides with Frs. 203,619,776.34, as well as the accompanying profit-and-loss account shewing a profit balance of Fr. 1,702,-692.31, result from the properly kept books of the company.

The presentation of the property situation in the annual report submitted conforms to the legal provisions. With regard to the valuation of the participation in the General Aniline & Film Corporation, New York, we refer explicitly to the statements in the annual report of the board of directors. Proof of the position of the bank balances and securities was given us by extracts of account and deposit receipts.

The profit-and-loss account correctly reflects the result of business so that on the basis of our examination we can propose to you the adoption of the annual report and the approval of the proposals of the board of directors regarding the business yield.

Yours truly,

J. WECKEMAN
M. DUPPENTHALER

722 Filed March 14, 1957

Transcript of Hearing Before Judge Pine

March 13, 1957

* * * * * * * * *

MR. JONES: Remember the so-called bar date, if your Honor please, was established some three years before the dismissal of the corporation from this case and for that reason, I respectfully submit to your Honor
723 that the bar date, whether it should be removed, whether it should be lifted, whether it should be extended, is a matter that need not be determined at this time.

Secondly, if your Honor please, the bar date is not a final order. It was not an order that we could appeal from. If and when this matter gets to the Court of Appeals, as it undoubtedly will before it is over, and the Court of Appeals should hold that the bar date should be extended or

that it should not have been, it was not timely entered or in order to do justice, a new bar date should be fixed for the presentation of claims, if this sale is permitted, then the rights are lost because the stock will be gone.

The statute, if your Honor please, as we read it is crystal clear and it says that where a suit is filed claiming any interest in property, the property shall be retained until that suit is disposed of.

This suit has not been disposed of and, as Mr. Schwartz, I think, said on a number of occasions when we argued the recapitalization matter—your Honor may recall this—he referred to it as the 15-85 issue, the question of whether or not the Government was entitled to 85 percent or 15 percent and your Honor said to him in substance this: "Mr. Schwartz, that is the very issue that must be determined in this case. What is the extent of enemy ownership in this corporation?"

724 That is an issue which has not been decided. Certainly the issue here of the rights of these plaintiffs has not been decided. This litigation, insofar as they are concerned, is still undetermined and I respectfully submit to your Honor that the injunction should issue.

* * * * * * * * *

731 THE COURT: (Interposing) Let me ask you this question. Assuming the validity of the bar date and assuming your derivative theory, with those two premises, aren't you adequately protected by the retention of 25 percent?

MR. MOSKOVITZ: Well, my answer to that——

THE COURT: (Interposing) On your derivative theory?

732 MR. MOSKOVITZ: No, your Honor.

THE COURT: I said assume the validity of the bar date?

MR. MOSKOVITZ: You are asking me to assume two inconsistent positions, if your Honor please, and it is very hard to answer that question.

THE COURT: Assume the validity of the bar date, your derivative action cannot go beyond the persons of the stock interest that have intervened?

MR. MOSKOVITZ: I believe they can.

THE COURT: I would like to know how?

MR. MOSKOVITZ: Because again I refer to the language in Special Master and refer to page six of our reply brief: "* * * that no harm can, in equity, result to the Government as a result of the above holding. The present intervenors can never recover more than what the Government, under Kaufman, was morally and legally obligated to return to the innocent stockholders."

In other words, the seizure of the property is a wartime measure. The Government can only retain that which is enemy. It must return—if the Government thinks it is a windfall, it cannot be a windfall to the Government. It is up to the Court to decide at that time whether it is a windfall to the present intervenors or whether equity will require that this bar date be lifted so other people
733 can participate.

THE COURT: It is a windfall to the Government if a nonenemy fails to file an application for its return. Isn't that true?

MR. MOSKOVITZ: In the view of the Special Master, that would be immoral and illegal.

THE COURT: Well, do you mean to say if nobody files an application for the return of property owned by a nonenemy that the Government has got to search out that person and pay him?

MR. MOSKOVITZ: No, if your Honor please, I believe it is for the Court and ourselves on our application to ask the Court at that time to lift the bar date because the bar date is not a final order. It is an interlocutory order, an expedient in order, if your Honor remember, to find out who are these people hiding behind Mr. Kaufman and Mr. Attenhofer. That was the whole spirit of the bar date at that time. Is this a phantom committee that is being organized hiding somewhere in Switzerland?

I recall Mr. Schwartz' remarks and I can see your Honor does too, and so, come and show your faces. Well, the people who are behind that committee did show their faces and they were not inconsiderable in number, but that was the purpose, if your Honor will recall, of the bar date. It was an interlocutory order designed to
734 put some meat and flesh on the skeleton of this intervention. It is not a final order.

If there is going to be a windfall, it should not be for the Government. Equity will, I think, require, as the cases we have cited show that the bar date is an interlocutory order and when the time comes, perhaps if there is only five percent nonenemy interest, your Honor may say that there is no use to lift the bar date. But surely, 85, 90 or 95 percent equity, I think, will require that we say to all people, come in and make yourselves known.

THE COURT: I can follow your argument if I assume that the bar date, which I entered, was illegal.

MR. MOSKOVITZ: If your Honor please, I didn't say it was illegal. What I said was the retention by the Government of more than that which they may lawfully retain would be illegal. I think that is almost so by definition. If they may only lawfully retain ten percent, it would be illegal for them to retain more. What I said was that if it should develop on the issue for the trial that the percentage is that much more than the number of intervenors, then it would be clearly, I think, incumbent upon your Honor in fairness and equity to allow all innocent stockholders to participate in that recovery regardless of whether they have intervened as of three years ago.

The bar date, as we see it, therefore, has nothing
735 to do with the measure of recovery. The measure of recovery is what was the percentage of enemy interest on the date of vesting? What was the percentage of nonenemy interest on the day of vesting? Once that is determined, then we get to the next question as to what shall be done with the bar date, how shall this property be

distributed, so that innocent people get it and not enemies.

The issue in this case as your Honor, I think, pointed out in the hearing on the findings of fact which were had when the motion for an injunction on reclassification was decided, what is the percentage? The Government is, in effect, trying to, on its own say-so, pre-try that issue for us and for the Court. We think that is a question left for the Court. We cannot say what that percentage can be now. It can be up to 100 percent. I think if your Honor pressed me, I would say literally, it can't be 100 percent, but it can be up to that. We don't know what it is. That is an issue which is an issue for the trial and the attempt to settle at this time and sell at this time any such percentage, clearly violates the mandate of the statute which requires that the property be retained until that issue is determined and a final judgment entered on that issue.

* * * * * * * * *

743 MR. MOSKOVITZ: We have cited the Fowkes cases, on page eight of our memorandum, in which the court vacated a previous bar order and said: "It is
744 submitted that the greatest justice is best accomplished in cases such as this to allow the fullest period of time for those employees who desire to have the benefit of the court's decree to come into the proceedings."

THE COURT: Right there, supposing for some equitable reasons, a claimant came into the District Court and asked me to remove the bar date in order that he might make a claim after the sale of the stock. He would not be deprived of his interests because he could take money instead of stock. Does that justify an injunction?

MR. MOSKOVITZ: If your Honor please, if it were not for Section 9 (a), I would say yes.

THE COURT: Does that justify an injunction?

MR. MOSKOVITZ: Because of Section 9 (a) it does. If it were not for Section 9 (a)—let's assume this were not a Section 9 (a) case and we had a proceeding with an injunction proceeding to restrain the sale of a house pending

determination of proceeding for someone coming in later after the court has ordered the sale and is bound by what has happened, but Section 9 (a) makes that impossible.

Now, if the number of these cases—

THE COURT: (Interposing) So long as the suit is pending?

MR. MOSKOVITZ: Our suit is pending.

THE COURT: Your suit is pending but you and the other intervenors do not have an interest greater
745 than 15 percent. That is what the Supreme Court has said.

MR. MOSKOVITZ: I don't think it said that, your Honor.

THE COURT: It stated the intervenors—I have forgotten which—I think this is from the Supreme Court—"are limited to an interest in the assets proportionate to their stock holdings." I think that is exactly what Mr. Jacoby read to you.

MR. MOSKOVITZ: "Our holding is that when the Government seizes assets of a corporation organized under the laws of a neutral country, the rights of innocent stockholders to an interest in the assets proportionate to the stockholdings must be protected."

We say, your Honor, that may be as high as 85 or 90 percent and that 85 or 90 percent must be protected. I don't believe that the bar date order is that final 85 percent of the innocent stockholders should not be protected.

THE COURT: Here is what the Supreme Court says, and I quote, and this is in the defendant's brief and it was read by Mr. Jacoby:

"Our holding is that when the Government seizes assets of a corporation organized under the laws of a neutral country, the rights of innocent stockholders to an interest in the assets proportionate to their stockholdings must be fully protected."

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748 MR. JONES: I can't tell your Honor what motivated many people in not joining. We do know, as I think

has been pointed out to your Honor, that there was quite a campaign by one of the newspapers in Switzerland saying this matter would be decided through diplomatic
749 channels or one thing and another, and they shouldn't join the interventions. I don't believe the Government would claim, if your Honor please, that more than 25 percent, and I take that as a very high figure, there is nothing to justify it but that the Government, I don't believe, would claim that more than 25 percent of Interhandel was owned by enemies. It would have to admit 75 percent of that corporation was owned by non-enemies, but they now seek to sell this property, 75 percent of it, and only leave 25 percent for the protection of the innocent stockholders who unquestionably would own 75 percent or better. They might own up, as Mr. Moskovitz said, to 100 percent.

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Oral Ruling of the Court

THE COURT: (Pine, J.) Well, gentlemen, it appears from the papers before me that the Attorney General proposes to invite bids for the purchase from him of approximately 427,000 shares of Common A stock and 1,540,000 shares of Common B stock of G.A.F. and, if satisfactory bids are received, to sell the stock.

The Attorney General is the record holder of approximately 91 percent of the outstanding Common A shares and 100 percent of the outstanding Common B shares. The bids will be opened April 23, 1957. That is little more than a month from today. Injunctions have been sought by the plaintiff Interhandel and by certain plaintiff intervenors, generally referred to as the Kaufman group and the Attenhofer group, to enjoin the defendant from proceeding with the proposed sale. I have no doubt that, either way I decide, an appeal will be taken to the Court of Appeals and an effort will be made to take the matter to the Supreme Court.

This view is based upon past experience with this protracted and extensively litigated lawsuit. It is therefore necessary, in the interest of justice, that I act as promptly as possible in order that these appeals may be taken, heard, and disposed of, if possible, prior to the date of the opening of the bids. The motions and briefs were submitted to me as they were filed and I have had an opportunity to read and consider them prior to this hearing and I have had the advantage of the extensive oral arguments and I am ready to rule. I read the briefs in advance in order that I might be able to act promptly and rule promptly.

754

The plaintiff intervenors' rights are limited by the Kaufman decision to an interest in the assets proportionate to their stockholdings. It appears that they represent only approximately 15 percent of the stockholdings of Interhandel. Under the bar date order, no stockholders other than those who intervene are permitted to receive any benefit from any judgment. Defendant plans to sell only 75 percent of the Interhandel vested stock of G.A.F. whereas the maximum recovery by the intervenors cannot exceed 15 percent of this Interhandel claimed G.A.F. stock. Defendant is therefore proposing to sell stock, an interest in which under no circumstances could be claimed by the plaintiff intervenors, and I reach this conclusion as to his right to sell on either the individual theory or the derivative theory.

I cannot subscribe to the theory of the intervening plaintiffs that they are entitled to a fractional interest in all the stock, or to the basis of their claim for all the vested property less only so much as is proportionate to the enemy stock interest. That theory might give the plaintiff intervenors something to which they are not entitled, namely, an interest in the nonenemy stock which, for some reason, has not been claimed. While the proportionate amount ultimately to be returned to the intervening plaintiffs has not been determined and will not

755

be determined until each claim has been finally decided, the maximum amount that can be recovered has been determined by the claims filed before the bar date and that is amply secured by the retention by defendants of the 25 percent not offered for sale.

When I spoke of maintaining the status quo in my opinion in relation to the injunction to forbid the reclassification of the stock, of course, as that opinion will show, it related to the status quo or integrity of each and every share of stock including those in which the plaintiff intervenors claimed an interest. In my opinion, that interest would have been injured by the total reclassification. No such situation exists here as the proposed sale is only to sell that stock in which intervening petitioners have no interest.

Now, so far as the motion for an injunction by Interhandel is concerned, I am of the opinion that it is not entitled to an injunction from this Court because final judgment has been entered herein and plaintiff lacks standing; and, also, this Court has no jurisdiction to issue it.

In the injunction proceeding last fall for
756 reclassification of the stock, it was not necessary to decide this point because the full relief sought was given at the instance of the plaintiff intervenors. Here it becomes necessary to decide the point because the plaintiff intervenors, as I have stated, are not entitled to the relief sought and I decide that Interhandel is not entitled to an injunction from this Court on the present record.

The pendency of a counter claim has no application to rights given under Section 9 (a). Counsel will submit, with all due speed, findings and conclusions in accordance herewith.

2335 Filed March 14, 1957

Motion of Attenhofer and Kaufman Intervenors for Rehearing

Come now the Attenhofer and Kaufman intervenors and move this Court for a rehearing with respect to the Court's opinion of March 13, 1957, denying said intervenors' applications for an injunctive order.

The basis for this motion is that the Court erred in holding that the intervenors represent only approximately 15 per cent of the outstanding stock of I. G. Chemie. The fact is that the uncontroverted evidence before the Court clearly establishes that the intervenors represent more than 25 per cent of the outstanding stock of I. G. Chemie.

On the date of vesting, General Aniline and Film Corporation (hereinafter called GAF) was the owner of record of 56,300 fully paid and 28,600 half-paid common shares of I. G. Chemie. (Gibbons' Affidavit, page 1).

Subsequent to the date of vesting, GAF distributed to the Attorney General, in lieu of cash dividends on
2336 the GAF shares vested from I. G. Chemie, 53,984 fully paid shares and 27,416 half-paid shares, or a total of 81,400 shares. (Gibbons' Affidavit, page 3).

There are presently outstanding the following shares of I. G. Chemie: (a) 100,000 shares 6% preferred of 100 Swiss francs par value, 20% paid in, (b) 166,000 shares of fully paid common, and (c) 27,416 half-paid shares of common held in status quo, subject to this Court's Order of February 3, 1949. (McGraw Affidavit, page 6). The 166,000 fully paid common shares plus 27,416 half-paid common shares represent a total of 193,416 fully paid and half-paid common shares outstanding.

In determining the proportionate interest of the present intervenors in I. G. Chemie, the preferred shares should be excluded because the by-laws of the corporation have

always provided that from the proceeds of liquidation the preferred shares shall be redeemed at 110% and the entire remainder shall be allocated to the common shares. (Cf. Plaintiffs' Exhibit 89-91 to the Sturzenegger deposition filed in this cause May 24, 1950). I. G. Chemie has at all times had sufficient non-vested assets to satisfy all claims of preferred stockholders as shown by its annual reports. (Cf. Annual Reports attached to the Wilson and McGraw Affidavits).

The intervenors appearing in this action presently own 41,683 shares of I. G. Chemie stock. (Jacoby Affidavit, page 3, paragraph 6).

The named intervenor-plaintiffs, being entitled to their proportionate share of all dividends issued on the GAF stock, as well as the GAF stock itself, are entitled to a porportionate share of the 81,400 shares distributed to the Attorney General as dividends, which proportion is 41,683/112,016 of the 81,400 shares so distributed, or 30,290 shares of I. G. Chemie. (The foregoing denominator of 112,016 is arrived at by deducting the 81,400 "dividend" shares from the 193,416 shares).

Thus the total claim of the present plaintiff-intervenors is to be measured by adding said 30,290 shares to
2337 their holdings of 41,683, making a total of 71,973 shares. The claim of the present plaintiff-intervenors, therefore, constitutes not less than 71,973/193,416, or 37.2%, rather than 15% as claimed by the Attorney General.

Even if we were to assume that the fraction of 41,683/112,016 should be 41,683/193,416 of 81,400 shares, the figure of 30,290 would be changed to 17,542. This would result in adding 17,542 to 41,683, so that the fraction would be, on this premise, 59,225/193,416, or 30.62%.

WHEREFORE, the motion for rehearing should be granted

and the Court should enter an injunctive order in favor of the plaintiff-intervenors.

Respectfully submitted,

HOGAN & HARTSON

By /s/ EDMUND L. JONES
EDMUND L. JONES
/s/ C. FRANK REIFSNYDER
C. FRANK REIFSNYDER
Attorneys for Attenhofer Plaintiff-Intervenors
/s/ ROBERT E. SHER
ROBERT E. SHER
/s/ ISADORE G. ALK
ISADORE G. ALK
/s/ JAMES H. HELLER
JAMES H. HELLER

GRAUBARD & MOSKOVITZ

By /s/ IRVING MOSKOVITZ
IRVING MOSKOVITZ
Attorneys for Kaufman Plaintiff-Intervenors

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766 Filed March 15, 1957

Transcript of Hearing Before Judge Pine

March 14, 1957

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[MR. JONES]: Now, on the date of vesting, General Aniline and Film was the owner of 56,300 fully-paid shares and 26,600 half-paid shares of I. G. Chemie. That appears in the Gibbons affidavit.

Subsequent to the date of vesting, General Aniline and Film declared dividends, stock dividends in lieu of cash dividends, of 53,986 fully-paid shares and 27,416 half-paid

shares, or a total of 81,400 shares of Chemie were paid to the Attorney General by way of a stock dividend.

Now, there were outstanding at the present time—

THE COURT: Now, G.A.F. owned these shares of Chemie as part of its assets?

MR. JONES: That's right.

The Government in computing the——

THE COURT: It was an asset just like money, wasn't it?

MR. JONES: That's right.

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Oral Ruling of the Court

THE COURT: I am of the view that the critical date, the basic date, the date when the interest of these intervenors was fixed and their rights were fixed, was at the time of vesting in 1942.

I am also of the opinion that the preferred stock should be considered and counted.

I approve of the method of reducing it to 20 per cent.

I do not see any basis for considering that the stock of Chemie in the portfolio of G.A.F. is treasury stock of Chemie.

I am of the opinion that if the intervenors are entitled to the increment on the vested property it can not relate back to increase their proportions. But apparently, even if it does, from the way the figures have been presented to me, the percentage of interest in Chemie of the intervenors is below 25 per cent.

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2343 Filed March 15, 1957

Findings of Fact and Conclusions of Law

The above-entitled cause came on for hearing on March 13, 1957, on three motions dated February 25, 1957

(1) "Motion of Plaintiff for an Injunctive Order to Enforce Section 9 (a) of the Trading with the Enemy Act."

(2) a motion filed by the Attenhofer plaintiff-intervenors, entitled "Motion for an Injunctive Order Requiring the Attorney General to Comply with the Provisions of Section 9 (a) of the Trading with the Enemy Act."

(3) a motion filed by the Kaufman plaintiff-intervenors, entitled "Motion for Injunction under Section 9 (a) of the Trading with the Enemy Act."

and on March 14, 1957 on a joint motion of the Attenhofer and Kaufman plaintiff-intervenors entitled "Motion of Attenhofer and Kaufman intervenors for rehearing," filed March 14, 1957.

The cause was heard on the aforesaid motions, the affidavits, memoranda and exhibits filed in support and
2344 in opposition, and on argument of counsel on March 13 and 14, 1957, and after due consideration thereof and having made rulings, dated March 13 and March 14, 1957, the Court finds and concludes:

Findings of Fact

1. By Vesting Order dated February 16, 1942, 7 Fed. Reg. 1406, Vesting Order No. 5, dated April 24, 1942, 7 Fed. Reg. 3148, and Vesting Order No. 907, dated February 15, 1943, 8 Fed. Reg. 2453, the Attorney General, acting under the Trading with the Enemy Act, vested in himself, *inter alia*, 455,624 common A shares of General Aniline & Film Corporation and 2,050,000 common B shares of the said corporation.

2. Thereafter, the Attorney General acquired an additional 65,085 shares of common A stock in General Aniline & Film Corporation in exchange for all the stock in General Dyestuff Corporation, which he had vested from others.

3. The Attorney General also, by certain other Vesting Orders, vested an additional 20,185 shares of common A stock.

4. By the aforesaid acquisitions, the Attorney General has vested in himself a total of 540,894 A shares and 2,050,000 B shares.

5. The Attorney General proposes to make a public offering for sale, by way of a prospectus dated February 21, 1957, of 426,988 common A shares and 1,537,500 common B shares of the said corporation, being 75% of the shares vested by the Vesting Orders described in paragraph 1, above, and all the other shares acquired by him as described in paragraphs 2 and 3, above. The sale was scheduled for April 23, 1957, and the Court was so informed when it made its ruling of March 13, 1957. The sale had, however, already been postponed to May 13, 1957.

2345 6. Plaintiff I. C. Chemie filed suit in 1948 for, *inter alia*, all the property vested by the Vesting Orders described in paragraph 1.

7. On February 3, 1949, the District Court for the District of Columbia entered an injunctive order against plaintiff and in favor of defendants in respect of 27,416 half-paid shares of plaintiff corporation.

8. Defendant answered and filed counterclaims against the plaintiff.

9. On December 21, 1953, the District Court for the District of Columbia entered an order dismissing the complaint of the plaintiff I. G. Chemie with prejudice. The order was stated to be inapplicable to the claims of any

stockholders who had intervened or might intervene in the case. (19 Fed. Rules Service 37b.243 Case 1).

10. On June 30, 1955, in Cause No. 12,140, the Court of Appeals for the District of Columbia affirmed the dismissal. 96 U. S. App. D. C. 232, 225 F. 2d 532. The order of the Court affirmed and continued:

> "... that if within six months after the receipt by the District Court of the mandate of this Court in this case discovery shall be made as required by the District Court, then the order dismissing the complaint shall be vacated by the District Court."

A petition for rehearing *in banc* was denied on September 1, 1955. The Supreme Court thereafter denied a petition for certiorari (350 U.S. 937, rehearing denied, 976).

11. By order dated July 11, 1956, this Court denied a motion by plaintiff I. G. Chemie for an extension of the six months' period specified in the order of the Court of Appeals, quoted in paragraph 10, *supra*. On July 23, 1956, this Court denied plaintiff I. G. Chemie's motion for reconsideration of the said order of July 11, 1956. On July 30, 1956, plaintiff I. G. Chemie filed a motion to va-
2346 cate the dismissal order of December 21, 1953. On August 3, 1956, this Court entered an order on the mandate of the Court of Appeals. On August 21, 1956, this Court denied plaintiff I. G. Chemie's motion to vacate said order. Plaintiff's motion of July 30, 1956 was overruled by order of August 21, 1956, *nunc pro tunc* August 3, 1956.

12. On July 23, 1956, plaintiff I. G. Chemie filed a notice of appeal from the said orders of July 11 and July 23, 1956.

13. On August 24, 1956, plaintiff I. G. Chemie filed a notice of appeal from the orders of August 3 and August 21, 1956.

14. The aforesaid appeals, Nos. 13,460 and 13,527, were consolidated by order of the Court of Appeals, dated September 10, 1956, and were heard before the Court of Appeals on February 11, 1957. These appeals are still under advisement and no opinion thereon has been handed down.

15. Pursuant to the decision of the Supreme Court in *Kaufman v. Societe, etc.*, 343 U.S. 156, the complaint in intervention of Eric G. Kaufman, et al. was filed in this Court. Thereafter, the complaint in intervention of Ernest Attenhofer, et al. was filed herein. On December 16, 1953, this Court entered a "bar date" order, affrming and modifying an order of the Special Master dated July 21, 1953; and thereafter complaints in intervention were filed by a number of additional stockholders of I. G. Chemie; and there are presently pending complaints in intervention by stockholders claiming to be the owners of 39,781 fully-paid and 1,902 half-paid common shares of I. G. Chemie, or a total of 41,683 common shares.

2347 16. At the dates of vesting and from June 1940 to 1948 I. G. Chemie had 350,000 shares of capital stock outstanding, as follows:

Number and Class of Shares	*Par Value*
100,000 shares of 6% preferred, 20% paid in	Sfrs. 100
140,000 shares of fully-paid common	Sfrs. 500
110,000 shares of half-paid common	Sfrs. 500
Total 350,000 shares.	

17. For the purpose of arriving at a single figure representing the proportion which plaintiff-intervenors' common stock bears to the total capital, comprised of both preferred and common, each share of preferred should be treated as the equivalent of one-fifth of a share of common, for the reason that the par value of the preferred is Sfrs. 100 as compared with the par value of Sfrs. 500 for the common. The 100,000 shares of preferred are thus

equivalent to 20,000 shares of common. The total capital of I. G. Chemie at the date of vesting and from 1940 to 1948 may therefore be regarded, in terms of common stock, as being 270,000 shares (the 250,000 shares of common and the 20,000 shares of equivalent common).

18. Since plaintiff-intervenors claim to own 41,683 shares, the proportion of the total capital which they represent is 41683/270000 or 15.439% of the total capital of I. G. Chemie.

ADDITIONAL FINDINGS OF FACT PROPOSED BY PLAINTIFF-INTERVENORS

19. In February, 1942, and continuously until 1944, General Aniline & Film owned 56,300 fully-paid and 28,600 half-paid common shares of I. G. Chemie. Between December 1, 1944, and October 18, 1946, General Aniline &
Film paid and transferred to the Attorney General,
2348 as dividends on the shares vested by the Vesting
Orders described in paragraph 1, 53,984 fully-paid and 27,416 half-paid I. G. Chemie common shares, totaling 81;400 shares.

20. The shares of capital stock of I. G. Chemie presently outstanding are 293,416, divided as follows:

Number and Class of Shares	*Par Value*
100,000 shares of 6% preferred, 20% paid in	Sfrs.100
166,000 shares of fully-paid common	Sfrs. 500
27,416 shares of half-paid common	Sfrs. 500
Total: 293,416.	

21. The by laws of I. G. Chemie in effect at the dates of vesting and at all times thereafter provide that from the proceeds of liquidation the preferred shares shall first be redeemed at 110% and the entire remainder shall be allocated to the common shares. At the dates of vesting and at all times thereafter the annual reports of I. G. Chemie

state that the corporation had non-vested assets valued in excess of an amount necessary to satisfy in full all rights of the outstanding preferred stock, if liquidation were to take place.

2349 CONCLUSIONS OF LAW

The conclusions of law are set forth in the aforesaid memoranda opinions of the Court dated March 13 and March 14, 1957, which are hereby made a part hereof, and ordered to be filed herewith.

Dated: March 15, 1957

/s/ DAVID A. PINE
Judge

Seen and approved as to form:

/s/ JOHN J. WILSON
Attorney for plaintiff I. G. Chemie

/s/ EDMUND L. JONES
Attorney for plaintiff-intervenor Attenhofer et al.

/s/ ISADORE G. ALK
Attorney for plaintiff-intervenor Kaufman et al.

2350 Filed March 15, 1957

Order

The above-entitled cause having come on for hearing on the joint motion of the Attenhofer and the Kaufman intervenor groups, filed on March 14, 1957, for rehearing on their motions for an injunction restraining defendant Herbert Brownell, Jr., and his agents, from selling or offering for sale, or otherwise disposing of, 426,988 common "A" shares and 1,537,500 common "B" shares of General Aniline and Film Corporation held by defendant Brownell, and on a response thereto filed by defendant and the Court having heard argument and considered the aforesaid motion and having delivered a ruling on March 14, 1957, and

having filed findings of fact and conclusions of law dated March 15, 1957, it is, by the Court, this 15th day of March, 1957.

2351 ORDERED, ADJUDGED AND DECREED:

That the aforesaid joint motion of the Attenhofer and the Kaufman intervenor groups for rehearing be, and it hereby is, denied.

/s/ DAVID A. PINE
Judge

Seen and approved as to form:

/s/ EDMUND L. JONES
Attorney for plaintiff-intervenor Attenhofer et al.

/s/ ISADORE G. ALK
Attorney for plaintiff-intervenor Kaufman et al.

2352 Filed March 15, 1957

Order

The abo e-entitled cause having come on for hearing on March 13, 1957, on the motions of plaintiff I. G. Chemie, and the Attenhofer and Kaufman intervenor groups, filed on February 25, 1957, for an injunction restraining defendant Herbert Brownell, Jr., and his agents, from selling or offering for sale, or otherwise disposing of, 426,988 common "A" shares and 1,537,500 common "B" shares of General Aniline and Film Corporation held by defendant Brownell, and the Court having heard argument of counsel and considered the aforesaid motions, the legal memoranda, affidavits, and exhibits filed in supoprt thereof and in opposition thereto, and having delivered a ruling on March 13, 1957, and having filed findings of fact and conclusions of law, dated March 15, 1957, it is, by the Court, this 15th day of March, 1957.

2353 ORDERED, ADJUDGED AND DECREED:

That the aforesaid motions of plaintiff I. G. Chemie and the Attenhofer and Kaufman intervenor groups be, and they hereby are, denied.

/s/ DAVID A. PINE
District Judge

Seen and approved as to form:

/s/ JOHN J. WILSON
Attorney for plaintiff I. G. Chemie

/s/ EDMUND L. JONES
Attorney for plaintiff-intervenor Attenhofer et al.

/s/ ISADORE G. ALK
Attorney for plaintiff-intervenor Kaufman et al.

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IN THE

Supreme Court of the United States

October Term, 1957

No. 298

ERIC G. KAUFMAN, et al.,

Petitioners,

v.

HERBERT BROWNELL, JR., Attorney General of the United States, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No.

ERIC G. KAUFMAN, et al.,

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v.

HERBERT BROWNELL, JR., Attorney General of the United States, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Eric G. Kaufman, et al., as nonenemy stockholders of Interhandel,[1] pray that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered on June 20, 1957 affirming orders of the District Court denying petitioners' motion for an injunction against the Attorney General to restrain him from selling, prior to the entry of a final judgment herein, 75% of Interhandel's vested assets, which are the subject matter of this suit.

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[1] The full name of the company, which is a Swiss corporation, is Societe Internationale pour Participations Industrielles et Commerciales, S.A. It is also sometimes referred to as "I. G. Chemie."

Opinions Below

The opinion of the District Court of March 13, 1957 (R. 263-5) is unreported. It is printed as Appendix B to this petition. The opinion of the Court of Appeals (R. 278-283) is not yet reported. It is printed as Appendix C to this petition.

Jurisdiction

The judgment of the Court of Appeals with respect to which the writ of certiorari is sought was entered on June 20, 1957 (R. 284). The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254(1).

Question Presented

Is the decision of the Court of Appeals in conflict with the 1952 holding of this Court in this case (*Kaufman* v. *Societe Internationale, etc.*, 343 U. S. 156)?

Statutes Involved

The pertinent statutory provisions are printed in Appendix A to this petition.

Statement

Plaintiff, Interhandel, filed suit in 1948 under Section 9(a) of the Trading With The Enemy Act, 50 U. S. C. App. §9(a), against the Alien Property Custodian for the return of almost all of the stock of its American subsidiary, General Aniline & Film Corporation, now valued at more than

$100,000,000 (R. 204), which had been previously vested by the Custodian. *Kaufman* v. *Societe Internationale, etc.*, 343 U. S. 156, 157. The Custodian answered that Interhandel was dominated and controlled by officers, agents, and stockholders who were engaged in a conspiracy with German nationals and with the German Government to operate the company's business in their interests during World War II, and, therefore, that the company was either an enemy or enemy-tainted. 343 U. S. at pp. 157-8.

In March of 1950, while this original suit was pending and as yet untried, Eric G. Kaufman and his wife, nonenemy stockholders of Interhandel, on behalf of themselves and all other stockholders of the plaintiff corporation similarly situated, sought to intervene in that suit. Their complaint alleged that it was Interhandel's corporate duty to assert not only a claim for full recovery of the vested assets but also an alternative claim for the return of a portion of the vested assets proportionate to the nonenemy stockholdings in the corporation even though other stockholders who dominate the company may be found to be enemies. 343 U. S. at p. 160. The complaint further alleged that the corporate management refused to assert such a claim and, therefore, that petitioners had a right to intervene to assert this corporate claim derivatively (R. 2-14). 343 U. S. at pp. 158, 160.

The District Court denied the motion to intervene, 90 F. Supp. 1011, and the Court of Appeals affirmed, 88 U. S. App. D. C. 296, 188 F. 2d 1017. The Court of Appeals recognized that petitioners were asserting a corporate claim, but denied intervention on the ground that there was no such corporate right of partial recovery, saying "a corporation has 'no "standing vicariously"' to assert the interest of its shareholders". 188 F. 2d at p. 1018.

This Court reversed, holding that if a neutral corporation should be found to have been enemy-tainted, it was nevertheless entitled to assert and enforce a corporate right to a partial recovery "not for the benefit of all stockholders but only for those who are nonenemies" (343 U. S. at p. 161), and that, because of the refusal of the corporation to assert this claim, petitioners were entitled to intervene as of right under Rule 24(a)(2) of the Federal Rules of Civil Procedure to file the amended complaint they had presented and to prosecute such claim. 343 U. S. at p. 162.

On remand, petitioners were given leave to intervene and filed their amended complaint in intervention. This complaint is still pending and awaiting trial. The original suit by Interhandel for return of all the vested assets has since been dismissed for failure to comply with a pre-trial discovery order. See *Societe Internationale, etc.*, v. *Brownell*, 96 U. S. App. D. C. 232, 225 F. 2d 532, *cert. denied* 350 U. S. 937.

During the course of pre-trial proceedings, and while the original suit for full recovery was still pending, the Special Master who had been appointed to hear the case entered a so-called "bar date" order on July 21, 1953. This order, as approved by the District Court, required all "stockholders in the plaintiff, who intend to intervene herein, or to join in, or to benefit from, one of said complaints in intervention", to file their appearances on or before March 31, 1954 or be forever barred from any benefit from any complaint already filed or thereafter to be filed as well as from any judgment entered respecting the rights or interests of Interhandel's nonenemy stockholders (R. 116-124).

Following the entry of the bar date order, a number of stockholders filed their appearances in the action, but a great many did not. The original suit of the corporation was then still before the court and had not been disposed of. At the time of the hearing in the District Court, there were on file appearances of stockholders owning 41,683 shares of Interhandel common stock. With one minor exception, all of these stockholders have joined either the Kaufman or another intervention.[2]

It having appeared from answers to interrogatories that most of these stockholders had acquired their stock subsequent to the vesting of Interhandel's assets,[3] the Government moved for summary judgment against them on the ground that their rights were barred by the Anti-Assignment Act. 31 U. S. C. 203. The Government argued that there was no corporate cause of action for partial return but only the separate claim of each individual stockholder; that such claims arose immediately upon the vesting; and that subsequent purchasers of the stock were transferees of such claims against the United States and therefore precluded from recovery by the statute. The Special Master on June 18, 1955 (R. 149-159) denied the Government's motion on the ground that the cause of action sustained by this Court in the *Kaufman* decision, 343 U. S. 156, was a derivative claim for corporate recovery; that since such claim had never been assigned the Anti-Assignment Act was inapplicable. In a carefully considered opinion, the Special Master concluded that this Court's opinion in *Kaufman* "shows on its face that it was dealing with a

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[2] Leave to intervene had been granted to Ernest Attenhofer, et al. (also appellants below) and to Annamarie Ruth Klingler, et al.

[3] The stock of Interhandel has been extensively traded on stock exchanges abroad. (*Kaufman* v. *Societe Internationale, etc.*, October Term, 1952, No. 172, R. 71; petitioner's brief p. 9, n. 10.)

derivative stockholder's suit" (R. 151). The decision of the Special Master was confirmed by the District Court (R. 161-2).

In September of 1956, the Government proposed to bring about a recapitalization of General Aniline & Film Corporation which would have changed certain rights and characteristics of its stock. It was further announced that the Attorney General was proposing to sell some of the vested GAF stock after the plan was put into effect.

Upon the motions of the intervenors, the District Court enjoined such proposed recapitalization. *Societe Internationale, etc.* v. *Brownell*, 145 F. Supp. 494. Referring to the duty of the Custodian under Section 9(a) of the Trading With The Enemy Act to retain vested property until final judgment is entered or suit is otherwise terminated, the Court held that this included the duty to preserve the integrity of the vested property and that "under the proposed plan the vested property would not be retained nor would its integrity be preserved as required" (R. 181). This decision was rendered on October 10, 1956.

On February 21, 1957, the Custodian announced his intention to sell 75% of the vested General Aniline & Film stock. Petitioners and the other intervenors immediately moved for injunctive relief under Section 9(a) of the Trading With The Enemy Act. Section 9(a) provides that once suit is instituted to recover an interest in vested property, the Custodian shall retain the property in his custody until "final judgment in favor of the claimant shall be fully satisfied" or until the suit is otherwise terminated. Petitioners pointed out that their complaint in intervention set forth a claim for corporate recovery based

upon the total nonenemy stock interest in Interhandel; that this would far exceed the 25% which the Custodian proposed to withhold from sale; that there had been no final judgment in the action nor even a hearing as to the extent of the nonenemy interest in Interhandel; and therefore that a sale of the vested assets at this time would be premature and in contravention of Section 9(a).

The Custodian argued that all stockholders who had not intervened in the action by March 31, 1954 were barred from recovery by the bar date order; that only 41,683 shares of stock were represented in the action by reason of appearances prior to such bar date, and that retention of the 25% of the vested stock would protect the rights of the holders of those shares.

Decisions of the Courts Below

The District Court denied the injunction, holding that under the bar date order no stockholders other than those who had intervened are permitted to receive any benefit from any judgment; that the intervenors' rights were limited by this Court's decision in the *Kaufman* case to an interest in the assets proportionate to their stockholdings; and that such interest is secured by the 25% of the stock excluded from sale (App. B, p. 30).

The Court of Appeals affirmed but seemingly on a different theory from that of the District Court. It construed this Court's holding in *Kaufman* as follows:

> "to us the Court is speaking clearly, succinctly and positively. To avoid multiplicity of actions by thousands of individual shareholders, a corporate action may be brought as one had been brought. In

that action an individual stockholder might intervene, and on the basis of his own entitlement, his individual right might be asserted'' (App. C, p. 36).

It then said:

> "Section 9(a) of the Act provides that when the court in an equity action finds an individual claimant's interest has been established, it shall order the 'payment, conveyance, transfer, assignment, or delivery . . . of the money or other property . . . or the interest therein to which the court shall determine said claim is entitled;' not the property or interest therein of some *other* claimant, or even of all claimants similarly situated, but of that to which '*said claimant*' is entitled, as established in the suit he instituted. '[S]uch money or property' commanded to be retained pending final judgment or decree can only be that to which claim is made by the claimant authorized by §9 to institute the action reflecting his own 'severable' right.''

The Court of Appeals concluded:

> "It follows that the intervenors here were not entitled to enjoin the sale of assets aggregating in value some $100,000,000 pending ascertainment (1) of their right and (2) the extent of their respective interests following the establishment of their severable rights.''

The Court of Appeals did not reach the questions of the validity and interlocutory character of the bar date order, and whether the order could satisfy the requirement of Section 9(a) that there be finality of judgment before sale, points which were extensively argued below.

Reasons for Granting the Writ

The decision of the Court of Appeals so conflicts with this Court's decision respecting the mode of protection of innocent stockholders' interests, as to produce a result opposite not only to what this Court held, but also to what it intended to accomplish by its holding.

After this Court's decision in *Clark* v. *Uebersee Finanz-Korporation,* 332 U. S. 480, 489 (1947), the petition for certiorari in the *Kaufman* case presented to this Court the question which there had been left open for "legislative or judicial clarification":

> "what part of the assets of a corporation organized under the laws of a neutral country may the Custodian retain where part of the corporate stock is owned by enemies, part by American citizens and part by non-enemy aliens?" *Kaufman* v. *Societe Internationale, etc.,* 343 U. S. 156, 158.

That question was answered not only with the substantive ruling that:

> "when the Government seizes assets of a corporation organized under the laws of a neutral country, the rights of innocent stockholders to an interest in the assets proportionate to their stockholdings must be fully protected" (pp. 159-160);

but with a decision as to the procedure by which those rights would be protected. This Court had construed the 1941 amendment to Section 5(b) of the Trading With The Enemy Act to enable the Government to seize the assets of neutral corporations in order to reach the enemy inter-

est therein. This Court having decided at the same time that Congress had not intended thereby to work a forfeiture of nonenemy stockholders' interests, a method best suited to their protection had to be adopted.

Two methods were proposed:

> Your petitioners proposed that a corporate claim be allowed, proportionate to the nonenemy interest in the seized assets, for the benefit of its nonenemy stockholders.
>
> The Government and *Interhandel* proposed instead, that if any right existed at all, there be permitted only separate claims by individual stockholders, each in his own behalf, for his pro-rata share of seized corporate assets.

This Court concluded that its substantive ruling would be best effectuated by means of a corporate derivative claim, as alleged by the *Kaufmans,* which this Court directed might be filed as of right under Rule 24(a)(2), not under Rule 24(a)(3) and not under Rule 24(b). The allegations of the petitioners' complaint in intervention were pointedly summarized in the opinion, as follows:

> "Alleging that they and others are nonenemy stockholders, petitioners charge that it is *Interhandel's corporate duty* to assert a claim for the return of their proportionate interest in the assets even though other stockholders who dominate the corporation are found to be enemies. Petitioners further allege that the corporate management refuses to assert such a claim, but continues to claim only a return of all assets on the theory that what-

> ever return is obtained must be divided among enemy and nonenemy shareholders in proportion to their stock holdings. This position is taken, petitioners charge, because the suit is being controlled by the very stockholders on whose account the Custodian seized the property and whose interest will be worthless if they are found to be enemies." (Emphasis supplied.)

Interhandel having refused to assert a corporate claim, this Court accordingly granted petitioners, on behalf of all nonenemy stockholders, leave to file this corporate derivative claim for the return of the nonenemy proportion of the seized assets, stating:

> "In view of our holding that Congress has recognized that nonenemy stockholders of nonenemy foreign corporations have a severable interest in corporate assets seized by the Custodian, it follows that the allegations of these petitioners entitle them to intervene. *These allegations,* if true, show that petitioners' interests may be inadequately represented and that they may be bound by a judgment in this corporate action. This brings the claim of intervention *squarely within* Rule 24(a)(2) of the Federal Rules of Civil Procedure." (Emphasis supplied.)

Noting the Government's contention that the rights sought to be protected were individual:

> "And it is argued that if nonenemy stockholders are to be given a chance in court (which right is challenged), they should be limited to individual suits for money judgments against the Custodian.",

this Court rejected it:

> "But we think the questions involved in disputes like this can be more appropriately resolved in the corporate actions authorized by §9(a) rather than by resort to a multiplicity of separate actions. * * * Courts trying such *corporate actions* have adequate equitable power and procedural flexibility to protect all interests, even when the *corporate recovery* is not for the benefit of all stockholders but only for those who are nonenemies." (Emphasis supplied.) (Omissions noted by * * *.)

The events subsequent to this Court's decision have confirmed the wisdom of the procedural choice made by this Court. Thus, the Government's motion to dismiss on the basis of the Anti-Assignment Act was denied because the derivative corporate claim had never been assigned (*supra*, p. 5).

The Court of Appeals by stating that "a corporate action may be brought as one had been brought" apparently recognized that this Court had expressly sustained the right and duty of the corporation—and upon its refusal to act, the secondary right of the stockholders—to assert and enforce a corporate claim for partial recovery of the vested assets for the benefit of nonenemy stockholders. Then, inexplicably, it cavalierly dismissed it:

> "We are no longer concerned with the problem of a corporate recovery, for the corporation's suit has been dismissed" (App. C, p. 36).

But it was exactly because the corporation's suit for recovery of all the vested assets might be dismissed that this Court permitted petitioners to intervene to assert a

corporate claim for partial recovery. Now the Court of Appeals points to such dismissal—the very contingency which was the reason for this Court's allowance of the corporate claim for partial recovery—as its reason for disregarding that claim! That the Court of Appeals disregarded the fact that the order of dismissal of the corporation's suit, by its very terms, specifically left unaffected the claim of your petitioners, merely compounds its error. *Societe Internationale* v. *Brownell,* 225 F. 2d 532, 535, n. 8.

The Court of Appeals' misconstruction is most glaringly revealed in its paraphrase of this Court's ruling:

> "We thus conclude as did the Court, that each innocent nonenemy stockholder permitted to intervene in the corporate suit, has a 'severable interest in corporate assets seized by the Custodian. . . .' When his right is established and the extent of that severable interest is shown, the courts have 'adequate equitable power and procedural flexibility to protect all interests', *including that of the Government*" (App. C, p. 36). (Emphasis supplied.)

What this Court actually said was (343 U. S. at p. 161):

> Courts trying such corporate actions have adequate equitable power and procedural flexibility to protect all interests, *even when the corporate recovery is not for the benefit of all stockholders but only for those who are nonenemies.* (Emphasis supplied.)

The Court of Appeals literally substituted the *interest of the Government* for the *corporate recovery,* and thereby completely changed the meaning of this Court's ruling.

In 1951, the Court of Appeals had held that there was no such thing as a corporate claim for partial return of

vested assets proportionate to the nonenemy interest in the corporation. In 1952 this Court reversed, holding that there was such a corporate claim and that it could be asserted derivatively. In 1957, the Court of Appeals said that if there ever was such a corporate cause of action it was a vehicle which had somehow or other been derailed.

In 1952, this Court expressly rejected the Government's contention that if nonenemy stockholders are to be accorded any rights, they should be limited to their individual claims against the Custodian. In 1957, the Court of Appeals adopted the identical argument by the Government which this Court had rejected in 1952.

The decision of the Court of Appeals deprives the innocent holders of thousands of shares of rights which this Court held must be fully protected. It does so by refusing to recognize the procedural vehicle which the Court approved, and foresaw as necessary, for the enforcement of those rights. Under the corporate derivative claim filed by petitioners, all nonenemy stockholders are represented in the action and their rights protected thereby. This Court adverted to the flexible power inherent in the courts of equity to protect those rights, and specifically, to do so in the disposition of the eventual partial "corporate recovery". Under the decision of the Court of Appeals, only 41,683 shares are the subject of "individual claims" and the innocent holders of the balance of the approximately 112,000 common shares outstanding in the hands of a scattered public, are left without protection.[4]

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[4] The District Court relied upon the bar date order to achieve the same result. Such order is not only inconsistent with the corporate nature of petitioners' suit but is clearly no more than an interlocutory order subject to modification or change at any stage of the pro-

In 1952, this Court considered the issues presented to be of sufficient importance to determine upon certiorari. The reasons which prompted this Court's grant of certiorari and decision in 1952 are no less compelling today. The very protection of the interest of innocent stockholders in the American assets of their neutral corporation which this Court decreed is endangered by the decision of the Court of Appeals.

In the language of this Court:

> "[W]hen the Government seizes the assets of a corporation organized under the laws of a neutral country, the rights of innocent stockholders to an interest in the assets proportionate to their stockholdings must be fully protected" (~~156~~ 343 U. S. at pp. 159-160).

Innocent stockholders should "not be driven to accept their share of whatever price the Government may happen to get from a sale of these valuable assets". 343 U. S. at 161.

Unless certiorari is granted now and the Court of Appeals' decision is promptly reversed, no part of the 75% of the vested stock will be within the reach of the innocent stockholders covered by this corporate derivative claim.

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ceedings. *Oppenheimer* v. *F. J. Young & Co.* (C. A. 2, 1944), 144 F. 2d 387; *Fowkes* v. *Dravo Corp.* (D. C. E. D. Pa. 1946), 75 F. Supp. 514; *Tennessee Coal, Iron & R. Co.* v. *Muscoda Local 123* (N. D. Ala. 1946), 5 F. R. D. 174; *cf. Employers Liability Assur. Corp.* v. *Astoria Mahogany Co.* (C. A. 2d, 1925), 6 F. 2d 945; *People* v. *Hopkins* (C. A. 2d, 1927), 18 F. 2d 731. Therefore it cannot be such a final judgment in the action as is prerequisite to sale under Section 9(a) of the Trading With the Enemy Act. Hence, it was error for the District Court to base a denial of injunctive relief on such bar date order.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A.

Trading With the Enemy Act, as Amended.

SEC. 2. That the word "enemy," as used herein, shall be deemed to mean, for the purposes of such trading and of this Act—

(a) Any individual, partnership, or other body of individuals, of any nationality, resident within the territory (including that occupied by the military and naval forces) of any nation with which the United States is at war, or resident outside the United States and doing business within such territory, and any corporation incorporated within such territory of any nation with which the United States is at war or incorporated within any country other than the United States and doing business within such territory.

(b) The government of any nation with which the United States is at war, or any political or municipal subdivision thereof, or any officer, official, agent or agency thereof.

(c) Such other individuals, or body or class of individuals, as may be natives, citizens, or subjects of any nation with which the United States is at war, other than citizens of the United States, wherever resident or wherever doing business, as the President, if he shall find the safety of the United States or the successful prosecution of the war shall so require, may, by proclamation, include within the term "enemy."

The words "ally of enemy," as used herein, shall be deemed to mean—

(a) Any individual, partnership, or other body of individuals, of any nationality, resident within the territory

(including that occupied by the military and naval forces) of any nation which is an ally of a nation with which the United Sttes is at war, or resident outside the United States and doing business within such territory, and any corporation incorporated within such territory of such ally nation, or incorporated within any country other than the United States and doing business within sueh territory.

(b) The government of any nation which is an ally of a nation with which the United States is at war, or any political or municipal subdivision of such ally nation, or any officer, official, agent, or agency thereof.

(c) Such other individuals, or body or class of individuals, as may be natives, citizens, or subjects of any nation which is an ally of a nation with which the United States is at war, other than citizens of the United States, wherever resident or wherever doing business, as the President, if he shall find the safety of the United States or the successful prosecution of the war shall so require, may, by proclamation, include within the term "ally of enemy."

The word "person," as used herein, shall be deemed to mean an individual, partnership, association, company, or other unincorporated body of individuals, or corporation or body politic.

The words "United States," as used herein, shall be deemed to mean all land and water, continental or insular, in any way within the jurisdiction of the United States or occupied by the military or naval forces thereof.

The words "the beginning of the war," as used herein, shall be deemed to mean midnight ending the day on which

Congress has declared or shall declare war or the existence of a state of war.

The words "end of the war," as used herein, shall be deemed to mean the date of proclamation of exchange of ratifications of the treaty of peace, unless the President shall, by proclamation, declare a prior date, in which case the date so proclaimed shall be deemed to be the "end of the war" within the meaning of this Act.

The words "bank or banks," as used herein, shall be deemed to mean and include national banks, State banks, trust companies, or other banks or banking associations doing business under the laws of the United States, or of any State of the United States.

The words "to trade," as used herein, shall be deemed to mean—

(a) Pay, satisfy, compromise, or give security for the payment or satisfaction of any debt or obligation.

(b) Draw, accept, pay, present for acceptance or payment or indorse any negotiable instrument or chose in action.

(c) Enter into, carry on, complete, or perform any contract, agreement, or obligation.

(d) Buy or sell, loan or extend credit, trade in, deal with, exchange, transmit, transfer, assign or otherwise dispose of or receive any form of property.

(e) To have any form of business or commercial communication or intercourse with.

SEC. 5. (b) (1) During the time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, and under such rules and regulations as he may prescribe, by means of instructions, licenses, or otherwise—

(A) investigate, regulate, or prohibit, any transactions in foreign exchange, transfers of credit or payments between, by, through, or to any banking institution, and the importing, exporting, hoarding, melting, or earmarking of gold or silver coin or bullion, currency or securities, and

(B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest,

by any person, or with respect to any property, subject to the jurisdiction of the United States; and any property or interest of any foreign country or national thereof shall vest, when, as, and upon the terms, directed by the President, in such agency or person as may be designated from time to time by the President, and upon such terms and conditions as the President may prescribe such interest or property shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States, and such designated agency or per-

son may perform any and all acts incident to the accomplishment or furtherance of these purposes; and the President shall, in the manner hereinabove provided, require any person to keep a full record of, and to furnish under oath, in the form of reports or otherwise, complete information relative to any act or transaction referred to in this subdivision either before, during, or after the completion thereof, or relative to any interest in foreign property, or relative to any property in which any foreign country or any national thereof has or has had any interest, or as may be otherwise necessary to enforce the provisions of this subdivision, and in any case in which a report could be required, the President may, in the manner hereinabove provided, require the production, or if necessary to the national security or defense, the seizure, of any books of account, records, contracts, letters, memoranda, or other papers, in the custody or control of such person; and the President may, in the manner hereinabove provided, take other and further measures not inconsistent herewith for the enforcement of this subdivision.

(2) Any payment, conveyance, transfer, assignment, or delivery of property or interest therein, made to or for the account of the United States, or as otherwise directed, pursuant to this subdivision or any rule, regulation, instruction, or direction issued hereunder shall to the extent thereof be a full acquittance and discharge for all purposes of the obligation of the person making the same; and no person shall be held liable in any court for or in respect to anything done or omitted in good faith in conncetion with the administration of, or in pursuance of and in reliance

on, this subdivision, or any rule, regulation, instruction, or direction issued hereunder.

(3) As used in this subdivision the term "United States" means the United States and any place subject to the jurisdiction thereof: *Provided, however,* That the foregoing shall not be construed as a limitation upon the power of the President, which is hereby conferred, to prescribe from time to time, definitions, not inconsistent with the purposes of this subdivision, for any or all of the terms used in this subdivision. Whoever willfully violates any of the provisions of this subdivision or of any license, order, rule or regulation issued thereunder, shall, upon conviction, be fined not more than $10,000, or, if a natural person, may be imprisoned for not more than ten years, or both; and any officer, director, or agent of any corporation who knowingly participates in such violation may be punished by a like fine, imprisonment, or both. As used in this subdivision the term "person" means an individual, partnership, association, or corporation.

SEC. 6. That the President is authorized to appoint, prescribe the duties of, and fix the salary (not to exceed $5,000 per annum) of an official to be known as the Alien Property Custodian, who shall be empowered to receive all money and property in the United States due or belonging to an enemy, or ally of enemy, which may be paid, conveyed, transferred, assigned, or delivered to said custodian under the provisions of this Act; and to hold, administer, and account for the same under the general direction of the Presi-

dent and as provided in this Act. The alien property custodian shall give such bond or bonds, and in such form and amount, and with such security as the President shall prescribe. The President may further employ in the District of Columbia and elsewhere and fix the compensation of such clerks, attorneys, investigators, accountants, and other employees as he may find necessary for the due administration of the provisions of this Act: *Provided,* That such clerks, investigators, accountants, and other employees shall be appointed from lists of eligibles to be supplied by the Civil Service Commission and in accordance with the civil-service law: *Provided, further,* That the President shall cause a detailed report to be made to Congress on the first day of January of each year of all proceedings had under this Act during the year preceding. Such report shall contain a list of all persons appointed or employed, with the salary or compensation paid to each, and a statement of the different kinds of property taken into custody and the disposition made thereof.

SEC. 7. (c) If the President shall so require any money or other property including (but not thereby limiting the generality of the above) patents, copyrights, applications therefore, and rights to apply for the same, trade marks, choses in action, and rights and claims of every character and description owing or belonging to or held for, by, on account of, or on behalf of, or for the benefit of, an enemy or ally of enemy not holding a license granted by the President hereunder, which the President after investigation shall determine is so owing or so belongs or is so held, shall

be conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or the same may be seized by the Alien Property Custodian; and all property thus acquired shall be held, administered and disposed of as elsewhere provided in this Act.

Any requirement made pursuant to this Act, or a duly certified copy thereof, may be filed, registered, or recorded in any office for the filing, registering, or recording of conveyances, transfers, or assignments of any such property or rights as may be covered by such requirement (including the proper office for filing, registering, or recording conveyances, transfers, or assignments of patents, copyrights, trade-marks, or any rights therein or any other rights); and if so filed, registered, or recorded shall impart the same notice and have the same force and effect as a duly executed conveyance, transfer, or assignment to the Alien Property Custodian so filed, registered, or recorded.

Whenever any such property shall consist of shares of stock or other beneficial interest in any corporation, association, or company or trust, it shall be the duty of the corporation, association, or company or trustee or trustees issuing such shares or any certificates or other instruments representing the same or any other beneficial interest to cancel upon its, his, or their books all shares of stock or other beneficial interest standing upon its, his, or their books in the name of any person or persons, or held for, on account of, or on behalf of, or for the benefit of any person or persons who shall have been determined by the President, after investigation, to be an enemy or ally of enemy and which shall have been required to be conveyed, trans-

ferred, assigned, or delivered to the Alien Property Custodian or seized by him, and in lieu thereof to issue certificates or other instruments for such shares or other beneficial interest to the Alien Property Custodian or otherwise, as the Alien Property Custodian shall require.

The sole relief and remedy of any person having any claim to any money or other property heretofore or hereafter conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or required so to be, or seized by him shall be that provided by the terms of this Act, and in the event of sale or other disposition of such property by the Alien Property Custodian, shall be limited to and enforced against the net proceeds received therefrom and held by the Alien Property Custodian or by the Treasurer of the United States.

SEC. 9. (a) That any person not an enemy or ally of enemy claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, or to whom any debt may be owing from an enemy or ally of enemy whose property or any part thereof shall have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States may file with the said custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; and the President, if application is made therefor

by the claimant, may order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States, or of the interest therein to which the President shall determine said claimant is entitled: *Provided,* That no such order by the President shall bar any person from the prosecution of any suit at law or in equity against the claimant to establish any right, title, or interest which he may have in such money or other property. If the President shall not so order within sixty days after the filing of such application or if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may institute a suit in equity in the Supreme Court of the District of Columbia or in the district court of the United States for the district in which such claimant resides, or, if a corporation, where it has its principal place of business (to which suit the Alien Property Custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title, or debt so claimed, and if so established the court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or the interest therein to which the court shall determine said claimant is entitled. If suit shall be so instituted, then such money or property shall be retained in the custody of the Alien Property Custodian, or in the Treasury of the United States, as provided in this Act, and until any final judgment or decree which shall be entered in favor of the claimant shall

be fully satisfied by payment or conveyance, transfer, assignment, or delivery by the defendant, or by the Alien Property Custodian, or Treasurer of the United States on order of the court, or until final judgment or decree shall be entered against the claimant or suit otherwise terminated.

SEC. 33. No return may be made pursuant to section 9 or 32 unless notice of claim has been filed: (a) in the case of any property or interest acquired by the United States prior to December 18, 1941, by August 9, 1948; or (b) in the case of any property or interest acquired by the United States on or after December 18, 1941, not later than one year from February 9, 1954, or two years from the vesting of the property or interest in respect of which the claim is made, whichever is later; except that return may be made to successor organizations designated pursuant to Section 32(h) of this Appendix if notice of claim is filed before the expiration of one year from August 23, 1954. No suit pursuant to section 9 may be instituted after April 30, 1949, or after the expiration of two years from the date of the seizure by or vesting in the Alien Property Custodian, as the case may be, of the property or interest in respect of which relief is sought, whichever is later, but in computing such two years there shall be excluded any period during which there was pending a suit or claim for return pursuant to section 9 or 32(a) hereof.

Appendix A (Federal Rules of Civil Procedure, as Amended)

Federal Rules of Civil Procedure, as Amended.

Rule 24

Intervention

a. *Intervention of Right.* Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action; or (3) when the applicant is so situated as to be adversely affected by a distribution or other disposition of property which is in the custody or subject to the control or disposition of the court or of an officer thereof.

APPENDIX B.

Oral Ruling of the District Court.

THE COURT: (Pine, J.) Well, gentlemen, it appears from the papers before me that the Attorney General proposes to invite bids for the purchase from him of approximately 427,000 shares of Common A stock and 1,540,000 shares of Common B stock of G.A.F. and, if satisfactory bids are received, to sell the stock.

The Attorney General is the record holder of approximately 91 percent of the outstanding Common A shares and 100 percent of the outstanding Common B shares. The bids will be opened April 23, 1957. That is little more than a month from today. Injunctions have been sought by the plaintiff Interhandel and by certain plaintiff intervenors, generally referred to as the Kaufman group and the Attenhofer group, to enjoin the defendant from proceeding with the proposed sale. I have no doubt that, either way I decide, an appeal will be taken to the Court of Appeals and an effort will be made to take the matter to the Supreme Court.

This view is based upon past experience with this protracted and extensively litigated lawsuit. It is therefore necessary, in the interest of justice, that I act as promptly as possible in order that these appeals may be taken, heard, and disposed of, if possible, prior to the date of the opening of the bids. The motions and briefs were sub-
754 mitted to me as they were filed and I have had an opportunity to read and consider them prior to this hearing and I have had the advantage of the extensive oral arguments and I am ready to rule. I read the briefs

in advance in order that I might be able to act promptly and rule promptly.

The plaintiff intervenors' rights are limited by the Kaufman decision to an interest in the assets proportionate to their stockholdings. It appears that they represent only approximately 15 percent of the stockholdings of Interhandel. Under the bar date order, no stockholders other than those who intervene are permitted to receive any benefit from any judgment. Defendant plans to sell only 75 percent of the Interhandel vested stock of G.A.F. whereas the maximum recovery by the intervenors cannot exceed 15 percent of this Interhandel claimed G. A. F. stock. Defendant is therefore proposing to sell stock, an interest in which under no circumstances could be claimed by the plaintiff intervenors, and I reach this conclusion as to his right to sell on either the individual theory or the derivative theory.

I cannot subscribe to the theory of the intervening plaintiffs that they are entitled to a fractional interest in all the stock, or to the basis of their claim for all the vested property less only so much as is proportionate to the enemy stock interest. That theory might give the plaintiff intervenors something to which they are not
755 entitled, namely, an interest in the nonenemy stock which, for some reason, has not been claimed. While the proportionate amount ultimately to be returned to the intervening plaintiffs has not been determined and will not be determined until each claim has been finally decided, the maximum amount that can be recovered has been determined by the claims filed before the bar date and that is

amply secured by the retention by defendants of the 25 percent not offered for sale.

When I spoke of maintaining the status quo in my opinion in relation to the injunction to forbid the reclassification of the stock, of course, as that opinion will show, it related to the status quo or integrity of each and every share of stock including those in which the plaintiff intervenors claimed an interest. In my opinion, that interest would have been injured by the total reclassification. No such situation exists here as the proposed sale is only to sell that stock in which intervening petitioners have no interest.

Now, so far as the motion for an injunction by Interhandel is concerned, I am of the opinion that it is not entitled to an injunction from this Court because final judgment has been entered herein and plaintiff lacks standing; and, also, this Court has no jurisdiction to issue it.

In the injunction proceeding last fall for
756 reclassification of the stock, it was not necessary to decide this point because the full relief sought was given at the instance of the plaintiff intervenors. Here it becomes necessary to decide the point because the plaintiff intervenors, as I have stated, are not entitled to the relief sought and I decide that Interhandel is not entitled to an injunction from this Court on the present record.

The pendency of a counter claim has no application to rights given under Section 9 (a). Counsel will submit, with all due speed, findings and conclusions in accordance herewith.

APPENDIX C.

Opinion of the United States Court of Appeals for the District of Columbia Circuit.

Before WILBUR K. MILLER, FAHY and DANAHER, *Circuit Judges.*

DANAHER, *Circuit Judge*: These are consolidated appeals lodged by two groups of intervenors in the corporate action commenced in 1948 by Societe Internationale, a Swiss corporation, formerly called I. G. Chemie, but now commonly known as Interhandel. Commencing in February 1942, the Attorney General or his predecessors issued a series of vesting orders by which, under the Trading with the Enemy Act,[1] the Government had seized some 93% of the stock of General Aniline & Film Corporation (hereinafter called GAF), said to have been the property of foreign nationals or owned by or held for I. G. Farbenindustrie A.G. of Germany. Background facts in substantial measure may be gleaned from our opinion in *Societe Internationale, Etc.* v. *Brownell.*[2] In the latter action, the Kaufman group was permitted to intervene,[3] after which the Attenhofer group was also allowed[4] intervention over the opposition of the Kaufman group. In all, some 2,488 stockholders intervened; the complaints of 720 were dismissed; and the remaining 1,768 stockholders own

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[1] 40 STAT. 411, as amended, 50 U.S.C. App. §§ 1-40 (1952).

[2] 96 U.S. App. D.C. 232, 225 F. 2d 532 (D.C. Cir. 1955), *cert. denied*, 350 U.S. 937 (1956); and see Societe Internationale, Etc. v. Brownell, Nos. 13460 and 13527 (D.C. Cir. Apr. 11, 1957).

[3] Kaufman v. Societe Internationale, 343 U.S. 156 (1952).

[4] Following the District Court's order, motion for leave to file petition for a writ of mandamus was denied, Kaufman v. Pine, 344 U.S. 891 (1952).

a total of 41,683 shares found by the District Court to represent 15.439% of the total outstanding stock of I. G. Chemie at the date of vesting. When the Attorney General announced on February 21, 1957, a proposed public sale of 75% of the shares of the vested GAF stock, appellants sought to enjoin the sale of any of the vested shares. Judge Pine denied motions for an injunction, and after appellants had moved jointly for rehearing, the District Court on March 15, 1957, made findings of fact and conclusions of law with respect to both motions for injunction and joint motion for rehearing. The same day two orders were entered denying all motions and these appeals followed.

Appellants in the Kaufman group claim, in effect, that theirs is a corporate derivative action which entitles them ultimately to the return of "the innocent proportion" of the vested assets and that such portion may well exceed 80% of the vested property.

Appellants in the Attenhofer group claim that the District Judge misconstrued the decision of the Court in *Kaufman* v. *Société Internationale*, erred in holding that the various appellants represent only themselves and not all non-enemy stockholders of Interhandel, and further, briefly, erred in holding that retention of 25% of the vested stock is sufficient in view of the respective claims.

Both groups insist that § 9(a) of the Trading with the Enemy Act[5] requires that *all* vested property here in-

[5] *Supra* note 1, 50 U.S.C. App. § 9(a).

volved "shall be retained" by the Custodian once suit is brought and until final judgment. Without our particularizing as to further details of the grounds upon which reversal is sought, we turn to the *Kaufman* case which we deem controlling.

The Court pointed out, as it supplied the background upon which intervention was permitted, that petitioners "admitted the right of the Custodian to retain an interest in the seized assets proportional to the stock ownership of enemy stockholders."[6] Thus the question was, said Mr. Justice Black, "What *part* of the assets of a corporation organized under the laws of a neutral country may the Custodian retain where *part* of the corporate stock is owned by enemies, *part* by American citizens, and *part* by nonenemy aliens?"[7]

The answer, in paraphrase, ran to the effect that all corporate assets may be seized, whereupon consideration must be given to the plight of innocent stockholders whose innocent interests are not required to be confiscated. Accordingly,

> "Our holding is that when the Government seizes assets of a corporation organized under the laws of a neutral country, the rights of innocent stockholders to an interest in the assets proportionate to their stock holdings must be fully protected. This holding is not based on any technical concept of derivative rights appropriate to the law of corporations. It is based on the Act which enables one not an enemy

[6] 343 U.S. at 158.

[7] *Ibid.* (Emphasis supplied.)

as defined in § 2 to recover any interest, right or title which he has in the property vested. The innocent *stockholder* may not have title to corporate assets, but *he* does have an interest which Congress has indicated should not be confiscated merely because some others who have like interests are enemies."[8]

The Kaufman petitioners there had attacked the position of the corporation, Interhandel, which sought return of "all its assets" on the theory they would suffer if "whatever return is obtained must be divided among enemy and nonenemy shareholders in proportion to their stock holdings."[9]

The Government, agreeing with the position of the corporate management, argued that if nonenemy stockholders were to be given any standing, they should be limited to individual suits for money judgments against the Custodian. "Petitioners claim a proportional right or interest in the specific assets of Interhandel . . . ."[10] Having so taken account of the respective arguments, and permitting maintenance of the corporate action, the Court then cut through the "corporate veil" and allowed—*in that corporate action*—the "nonenemy stockholder *in his own right* [to] . . . assert *his* nonenemy character in order to protect *his own interest* from the enemy taint caused by other stockholders."[11]

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[8] 343 U.S. at 159-60. (Emphasis supplied.)

[9] *Id.* at 160.

[10] *Id.* at 161.

[11] *Ibid.* (Emphasis supplied.)

Appendix C (Opinion of the United States Court of Appeals for the District of Columbia Circuit)

To us the Court is speaking clearly, succinctly and positively. To avoid multiplicity of actions by thousands of individual shareholders, a corporate action may be brought as one had been brought. In that action an individual stockholder might intervene, and on the basis of his own entitlement, his individual right might be asserted. If he could not prove his right, that ended the matter, but at least he might intervene to show his own nonenemy character. Thus, the petitioners, represented then by the Kaufman group, were allowed to intervene over the strong dissent which saw the majority permitting a friendly stockholder to withdraw his contribution to the funds of the corporation.[12]

We are no longer concerned with the problem of a corporate recovery, for the corporation's suit has been dismissed.[13] We thus conclude as did the Court, that each innocent nonenemy stockholder[14] permitted to intervene in the corporate suit, has a "severable interest in corporate assets seized by the Custodian . . . ."[15] When his right is established and the extent of that severable interest is shown, the courts have "adequate equitable power and procedural flexibility to protect all interests,"[16] including that of the Government.

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[12] 343 U.S. at 168

[13] *Supra* note 2.

[14] Fritz von Opel v. Brownell, —— U.S. App. D.C. ——, —— F. 2d ——, No. 13265 (D.C. Cir. May 23, 1957).

[15] 343 U.S. at 161.

[16] *Ibid.*

Section 9(a) of the Act provides that when the court in an equity action finds an individual claimant's interest has been established, it shall order the "payment, conveyance, transfer, assignment, or delivery . . . of the money or other property . . . or the interest therein to which the court shall determine said claimant is entitled;" not the property or interest therein of some *other* claimant, or even of all claimants similarly situated, but of that to which "*said claimant*" is entitled, as established in the suit he instituted. "[S]uch money or property" commanded to be retained pending final judgment or decree can only be that to which claim is made by the claimant authorized by § 9 to institute the action reflecting his own "severable" right.

It follows that the intervenors here were not entitled to enjoin the sale of assets aggregating in value some $100,000,000 pending ascertainment (1) of their right and (2) the extent of their respective interests following the establishment of their severable rights.

But, it is argued, the District Court in any event erred in finding that the interests of the intervening groups did not exceed 25% of the vested assets, indeed that it was error to find such interests amounted to only 15.439% of the total outstanding stock of I. G. Chemie at the date of vesting. We cannot say the District Court abused its discretion or otherwise erred in retaining 25% of the vested assets to answer to such claims and interests as shall be established.

Affirmed.

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Office - Supreme Court, U.S.
FILED
JUL 19 1957
JOHN T. FEY, Clerk

No. 299

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

ERNEST ATTENHOFER, ET AL., *Petitioners,*

v.

HERBERT BROWNELL, JR., Attorney General of the United States, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No.

ERNEST ATTENHOFER, ET AL., *Petitioners,*

v.

HERBERT BROWNELL, JR., Attorney General of the United States, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners, Ernest Attenhofer, et al., pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in the above cause on June 20, 1957.

OPINIONS BELOW

The oral opinions of the District Court on the motion for injunction and on the motion for rehearing are unreported. Both are reprinted as Appendix B. The

opinion of the Court of Appeals, which is reprinted hereinafter as Appendix C, is reported at F. 2d

JURISDICTION

The judgment of the Court of Appeals (Appendix C, *infra*. p. 6a.) was entered on June 20, 1957. The jurisdiction of this Court is invoked under 62 Stat. 928, 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Did the courts below misconstrue and misapply the decision of this Court in *Kaufman* v. *Societe Internationale,* 343 U.S. 156, when they refused to permit petitioners (and other intervening stockholders) to establish the non-enemy ownership of a neutral corporation as of the time of the vesting of its property?

2. Section 9(a) of the Trading With the Enemy Act requires that when suit is instituted to recover an interest in vested property, the Custodian must *retain* the property in his custody until that suit is terminated. Where such a suit is pending and the interest of the petitioners in the vested property has not been adjudicated, may the Custodian nevertheless sell 75% of the vested property in violation of his statutory duty?

3. May a district court, in a suit under Section 9(a) of the Trading With the Enemy Act, limit the maximum recovery of plaintiff stockholders without a trial on the merits by imposing an interlocutory "bar date" and thereafter give said interlocutory "bar date" the effect of a final order so as to permit the Custodian to evade the retention provisions of Section 9(a)?

4. Did the District Court properly compute the interest of petitioners in the vested property in determining that such interest (together with that of other intervenors) did not exceed 25% of said property?

STATUTES INVOLVED

The pertinent provisions of the Trading With the Enemy Act of 1917, 40 Stat. 411, as amended, 50 U.S.C. App. § 9, are set forth in Appendix A (p. 1a herein).

STATEMENT

Beginning on February 16, 1942, respondent's predecessors issued a series of orders which vested the American assets of a Swiss corporation now known as Interhandel. As a result, respondent's predecessors acquired approximately 93% of the stock of General Aniline & Film Corporation, a Delaware corporation, hereinafter called GAF, consisting of 455,624 shares of common A stock and 2,050,000 shares of common B stock, valued in excess of $100,000,000, plus certain sums of cash in United States banks.[1] The Attorney General also, by certain other orders, vested from other GAF stockholders 20,185 shares of common A stock (R. 202, 271), and he acquired an addi-

[1] The stock of GAF was vested on February 16, 1942, by the Secretary of the Treasury. V.O. February 16, 1942, 7 F.R. 1046. This stock was vested again on April 24, 1942, by the Alien Property Custodian following his appointment. V.O. No. 5, April 24, 1942, 7 F.R. 3148. An additional group of 176 shares was vested on Februar, 15, 1943. Other vesting orders were issued in 1946 but these vested sums of money only. V.O. 6718, June 24, 1946, 11 F.R. 7643; Supp. V.O. No. 6767, June 26, 1946, 11 F.R. 7733; Supp. V.O. No. 6768, June 26; 1946, 11 F.R. 7733; Supp. V.O. No. 6769, June 26, 1946, 11 F.R. 7734; Supp. V.O. 7874, October 14, 1946, 11 F.R. 13887.

tional 65,085 shares of common A stock in GAF in exchange for all the stock in General Dyestuff Corporation, a corporation which he had vested from others not involved in this suit. (R. 271)

On October 21, 1948, Interhandel filed Civil Action No. 4360-48 (the suit in which the present appeal arose) in the United States District Court for the District of Columbia to recover the stock of GAF and other property which had been taken from it. (R. 6, 7)

On March 14, 1950, Eric G. Kaufman and members of his family sought to intervene in that suit alleging that Interhandel was entitled to the return of that portion of the vested property which is proportionate to the interest in the corporation held by non-enemies *even if* the corporation were ultimately determined to be an enemy or enemy tainted. The District Court denied Kaufman's motion to intervene, the Court of Appeals affirmed, 88 U.S. App. D.C. 296, 188 F. 2d 1017, but this Court reversed, *Kaufman* v. *Societe Internationale,* 343 U.S. 156, and directed that the Kaufman complaint in intervention be filed.

On June 16, 1952, petitioners Ernest Attenhofer, et al., also stockholders in Interhandel, sought leave to intervene (R. 27), which was granted. (R. 63-72, 73, 110)

On April 16, 1953, respondent filed a motion to require all shareholders of interhandel intending to intervene to enter this litigation as parties. This motion was opposed by petitioners but was granted by the Special Master pursuant to an opinion and an order filed on July 21, 1953. (R. 112, 116) In this order, hereinafter referred to as the "bar date" order,

the Special Master required that all shareholders of Interhandel who desired to intervene should do so on or before January 1, 1954, failing which they were thereafter to be barred from all benefits of any judgment which might be obtained in this action.

Petitioners, by motion in the District Court, challenged the Special Master's ruling. (R. 122) On December 16, 1953, a full 31 months before the suit by Interhandel seeking return of *all* the vested property was finally dismissed, the District Court (Pine, J.), in order to accommodate respondent's desire to invoke discovery procedures, confirmed the "bar date" order but extended the cut-off date to March 31, 1954. (R. 123) This order was interlocutory in all respects.

Although some 2,500 individual shareholders of Interhandel owning some 55,000 fully-paid and 1,900 half-paid shares of stock intervened, numerous others failed or refused to come in, apparently because the expense and effort of such interventions would be wasted if the corporation won its suit.[2]

Meanwhile, another district judge (Laws, C. J.) was conducting proceedings relating to the suit of plaintiff Interhandel. On December 21, 1953, he entered an order dismissing Interhandel's complaint with prejudice for failure (inability) to comply with the terms of a discovery order but reserved the right to intervening shareholders (petitioners and others) to pursue their secondary cause of action. *Societe Internationale* v. *McGranery,* 111 F. Supp. 435, 448. The Court of Appeals affirmed the dismissal of Interhandel's complaint but granted the corporation an

[2] The corporation's suit was finally dismissed by the District Court on August 3, 1956.

additional period of 6 months within which to comply with the District Court's discovery order. 96 U.S. App. D.C. 232, 225 F. 2d 532.

On August 31, 1956, the District Court (Laws, C. J.) concluded that Interhandel had not complied with the order for the production of documents and dismissed the complaint with prejudice. *Societe Internationale* v. *Brownell,* U.S. App. D.C. , 243 F. 2d 254.

In September of 1956, GAF announced plans to reorganize its capital structure and respondent announced his intention of voting the stock vested from Interhandel (constituting approximately 93% of the outstanding stock) in favor of said plan. (R. 178, 181) Petitioners and others moved to enjoin the proposed recapitalization. The District Court (Pine, J.) issued findings of fact, conclusions of law and an order (R. 176) restraining respondent and his agents from voting for or otherwise proceeding with a proposed plan of recapitalization of the stock of GAF on the ground that the proposed recapitalization violated the retention provisions of Section 9(a) of the Trading With the Enemy Act. Respondent appealed from this injunctive order and said appeal is presently pending (but has not been argued) in the Court of Appeals.

Thereafter, in a prospectus filed with the Securities & Exchange Commission dated February 21, 1957, respondent announced a proposed public sale of 75% of the shares of the vested GAF stock. (R. 203) Petitioners and others, i.e., Eric G. Kaufman, et al., promptly moved to enjoin this proposed sale. (R. 201) Respondent opposed the issuance of an injunction, contending that petitioners and the other intervenors

represented only some 15% of the stock of Interhandel and that since each stockholder's recovery was limited to an interest in the vested property proportionate to his stockholdings, respondent was free to sell the remaining 85% of the vested property free from the duty imposed by Section 9(a) to hold the property intact pending litigation. The District Court (Pine, J.) denied the motion for injunction as well as a joint motion for rehearing filed by petitioners and the Kaufman intervenors. (R. 263, 275) The Court of Appeals consolidated petitioners' appeal with that of the Kaufman intervenors and affirmed the District Court's refusal to enjoin the sale. Appendix C, *infra*, p. 6a.

REASONS FOR GRANTING THE WRIT

(a) The courts below erroneously interpreted and misapplied the decision of this Court in *Kaufman* v. *Societe Internationale*, 343 U.S. 156. In that case, Kaufman filed a motion for leave to intervene in the suit brought by Interhandel to recover its vested property. He alleged that he and other non-enemy stockholders had interests in the corporate assets which it was Interhandel's duty to protect, that the dominant enemy group which had charge of the suit would not press the corporate claim adequately to protect the claims of innocent shareholders and that his group had a right, in a derivative capacity, to intervene under Rule 24 (a) of the Federal Rules of Civil Procedure on behalf of himself and all other non-enemy stockholders similarly situated.

This Court reversed a denial of Kaufman's right to intervene. Mr. Justice Black, speaking for the Court, pointed out that Interhandel is a neutral corporation

organized in Switzerland, and that while the 1941 amendment of the Trading With the Enemy Act permits the piercing of the corporate veil for the purpose of finding enemy taint, the amended Act does not contemplate appropriation of friendly or neutral assets.

This Court noted that a mere narration of the allegations showed that Kaufman's fears were by no means fanciful. Although Kaufman, in order to play safe, had filed a separate suit in a federal district court, the Court thought that questions involved in disputes like this can be more appropriately resolved in "corporate actions" authorized by Section 9(a) than by resort to a multiplicity of separate actions. Mr. Justice Black stated that courts trying such "corporate actions" have adequate equitable power and procedural flexibility to protect all interests, even when the corporate recovery is not for the benefit of all stockholders but only for those who are non-enemies. The allegations thus brought the claim of intervention squarely within Rule 24(a)(2) of the Federal Rules of Civil Procedure.

As pointed out above, Kaufman's complaint was derivative in character, seeking to enforce rights existing in the corporation's stockholders to recover such part of the vested assets as were proportionate to the non-enemy stock ownership of plaintiff Interhandel. This Court was well aware of the Kaufman allegation that approximately 10.9% of the stock of Interhandel was held by enemies and that the other 89% was presumably held by non-enemies. (R. 8, 10, 12) This Court visualized very clearly that the percentage of the non-enemy ownership of Interhandel could be established by Kaufman on behalf of all non-

enemy shareholders and that thereafter the shareholders might come forward to establish their non-enemy status and claim their proportionate share of the recovery. This Court stated that the District Court possessed adequate equitable power and procedural flexibility to protect all interests in such an event, even that of the Government.

However as will be discussed more fully hereafter, the courts below refused to permit Kaufman and these petitioners to establish Interhandel's title to the vested property and the percentage of non-enemy ownership of its stock but rather, prematurely and without a trial on the merits, permitted a procedural, interlocutory order to cut off their rights and thus adjudicate their claim. This Court's holding in *Kaufman*, while not based on any technical concept of derivative rights appropriate to the law of corporations, stood squarely on the right of each non-enemy shareholder "to recover any interest, right or title which he has in the property vested" (343 U.S. at 160) and contemplated that the District Court would justly exercise its "adequate equitable power and procedural flexibility to protect all interests . . . ." (343 U.S. at 161)

The courts below have thus completely frustrated the very purpose of this Court's decision—to protect the rights of innocent stockholders until the controversy over both Interhandel's status and the proportionate interest of the stockholders is finally settled.

(b) Section 9(a) of the Trading With the Enemy Act[8] provides that once suit is instituted to recover-

[8] The Trading With the Enemy Act has required almost constant interpretation and supervision by this Court. From the time of

an interest in vested property, the Alien Property Custodian is under a duty to *retain* the property in his custody until the termination of the litigation by final judgment or otherwise. Such a provision is necessary to give the arbitrary vesting power constitutional validity. See *e.g. Stoehr* v. *Wallace*, 255 U.S. 239, 245-246.

In this case, litigation is pending in which petitioners are asserting *an interest* (the amount of which is to be established at the trial) in the vested property. However, the Custodian seeks to avoid the statutory requirement that he retain the property by invoking a procedural ruling, entirely interlocutory in nature, which he contends has determined and limited the rights of petitioners to a total recovery of less than 25% of the vested property *in spite of the fact that petitioners have not had a trial to determine what their interest is.* If allowed to proceed with his attempt to sell 75% of the vested property under these circumstances, the Custodian will have succeeded in avoiding the very provisions of the Act which give it constitutionality.

Central Trust Co. v. *Garvan*, in 1921, 254 U.S. 554, through *Benn, Meyer & Co.* v. *Miller*, 266 U.S. 457; *Markham* v. *Cabell*, 326 U.S. 404; *Clark* v. *Uebersee Finanz-Korp.*, 332 U.S. 480, to *Kaufman* v. *Societe Internationale*, 343 U.S. 156, and the second *Uebersee* case in 1952, 343 U.S. 205, this Court has found it necessary to guide lower courts to a proper construction. That this has been so is not surprising for, as Mr. Justice Douglas stated when describing this statute in the first *Uebersee* case, *supra:*

> "We are dealing with hasty legislation which Congress did not stop to perfect as an integrated whole. Our task is to give all of it—1917 to 1941—the most harmonious, comprehensive meaning possible."

This result is reached as follows: On December 16, 1953, the District Court required all shareholders of Interhandel to enter their appearances as parties within less than four months from that date or be *forever barred* from any and all benefits arising out of any judgment rendered in the suit. This order was not only entirely interlocutory[5] (and thus not appealable), but was so premature as to border on the fantastic. Yet some three years later, the District Court gave to this "bar date" order the full effect of a *final judgment* on the merits. It held that the Custodian need not retain the vested property (as required by Section 9(a)) because (1) the "bar date" order cut off all stockholders except those now in the case, and (2) the stock interest of those now in the case amounts to less than the number of shares to be disposed of by the Custodian. The result is that 75% of the vested stock will be finally disposed of, passing forever out of the control of present stockholders, before any review is had of the "bar date" order used to release the stock.

"Bar date" orders are well known to the law and are frequently entered in certain types of actions, such

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[4] This "bar date" order was originally suggested not by the respondent but by the Special Master. Respondent sought to serve interrogatories on shareholders of Interhandel who were not parties. The Special Master held that no authority existed for this but suggested that if respondent desired to make application he would enter an order directing all shareholders to intervene. Respondent's basic purpose, therefore, was to utilize discovery procedures—not to limit prospective claimants. (R. 98-109)

[5] It neither disposed of nor determined the merits of petitioners' claim in the District Court. It did not adjudicate the ultimate rights of the parties or put the case out of court. It did not purport to limit the shares of recovery which petitioners were claiming. (R. 116-124)

as Fair Labor Standards Act cases and proceedings on creditors' bills, where they are properly invoked. In such cases, suit is normally filed by one member of a class to enforce the liability of a defendant to the members of the class. Intervention is normally *allowed* by additional members of the class only after the rights of the class to a recovery are fixed so that the members thereof may establish their share in such recovery. See Commentary on *Intervention in Class Actions*, 5 Federal Rules Services 831, 883. Cf., *e.g.*, *System Federation No. 91* v. *Reed* (CA 5) 180 F. 2d 991, where intervention was permitted after the entry of judgment "to secure the benefits" of the decree, and *Dickinson* v. *Petroleum Conv. Corp.*, 338 U.S. 507, where an interlocutory judgment was entered on the class claim and provision was made for a "concourse" to determine the claims of the individual members and to apportion the recovery as between them.

But such "bar dates" must be reasonable and timely—and the timeliness of such orders must be determined *not merely by a desire to reduce the number of litigants* or by the mere lapse of time, but by the test of prejudice or unfairness to the interests of the opposing party arising within the period between the filing of the complaint and the time fixed for the cut-off date. *Tennessee Coal, Iron & Railroad* v. *Muscoda Local 123*, 5 F.R.D. 174.

Here, the "bar date" was effective as of March 31, 1954. The complaint of plaintiff Interhandel was not finally dismissed by the District Court until over two years later, on August 3, 1956. Since petitioners' rights were admittedly "secondary" and would arise *only if* Interhandel lost its suit, petitioners' case could

not possibly have been tried until Interhandel's rights had been finally determined. As a matter of fact, on the date of the filing of the instant petition (July 19, 1957) petitioners' case has not yet been set for trial—some 39 months after the "bar date". A mere narration of these facts shows that the "bar date" was grossly untimely and premature as a matter of law.

Yet, it was this very "bar date" which the District Court permitted the Custodian to use as a shield to avoid the *retention* requirement of § 9(a). And the Court of Appeals, in basing its decision on the District Court's computation[6] that owners of only some 15% of Interhandel stock had intervened in response to the "bar date" and that all other shareholders were barred, narrowly construed § 9(a) as requiring the Custodian to retain only an amount of the vested property equivalent to the 15% of stock that had intervened, thus effectively preventing a trial on the issue of the amount petitioners are entitled to and reading the retention requirement of § 9(a) completely out of the statute.

(c) It appears from the pleadings in this case that some 10.9% of the shares of Interhandel were owned by German citizens. (R. 8, 10, 12) The basic questions to be determined at the trial of petitioners' suit are (1) whether Interhandel actually had title to the vested property, and (2) if it did, the percentage of enemy ownership of Interhandel on the date of vesting.

Where, as here, the determination of multiple and complicated issues is dependent upon the resolution

[6] That this computation was erroneous is pointed out at pp. 17-18, *infra*.

of one or two preliminary questions, this Court has said that orderly procedure requires the resolution of the preliminary questions first. In *Sinclair Refining Co.* v. *Jenkins Petroleum Process Co.*, 289 U.S. 689, 693, Mr. Justice Cardozo stated for the Court:

> "There are times when a suit is triable in separate parts, one affecting the right or liability, and the other affecting the measure of recovery. In suits of that order a discovery as to damages will commonly be postponed until the right or liability has been established or declared. . . . As a general thing it will be useless to decree it any earlier, and may even be oppressive. 'The principle of judicial parsimony' (L. Hand, J., in *Pressed Steel Car Co.* v. *Union Pacific R. Co.*, *supra* [D.C., 240 F. 135], if nothing more, condemns a useless remedy. This division of the trial into stages or instalments will happen oftenest in suits in equity, though it is now unknown in actions at law where a jury has been waived. In equity it is common practice. Thus, a suit to establish a partnership or to restrain the infringement of a patent culminates, if successful, in an interlocutory decree which will be followed by an accounting and a discovery of documents. In these and like cases, the accounts will not be probed until the right has been adjudged."

Numerous cases have followed this principle of staying proceedings for the determination of subservient questions until the resolution of the dominant one. *E.g.*, *Full-Vue Co.* v. *American Optical Co.*, 11 F.R.D. 185; *Zenith Radio Corp.* v. *Dicto Products Co.*, 6 F.R.D. 597; *Ball* v. *Paramount Pictures, Inc.*, 4 F.R.D. 194; *Momand* v. *Paramount Pictures Distributing Co.*, 36 F. Supp. 568; *Stewart-Warner Corp.* v. *Staley*, 2 F.R.D. 199; *Carter Printers* v. *Cannon*, 2 F.R.D. 174.

In *Pentland* v. *Dravo Corp.*, 3 Cir., 1945, 152 F. 2d 851, the court, in a Fair Labor Standards Act case, refused to compel intervention even after the case had been pending as long as six months, where there was no imminence of a trial.

In *York* v. *Guaranty Trust Co.*, 2 Cir., 1944, 143 F. 2d 503, reversed on other grounds, 326 U.S. 99, the court applied a rule which is singularly apposite here. That case involved a suit by a note holder on behalf of herself and other note holders similarly situated, to recover money allegedly due as the result of a breach of a fiduciary relation. An effort was made to make the other note holders named parties plaintiff. As here, however, their rights to recover depended upon a primary question. In *York,* the question was whether there had been a breach of trust. The Second Circuit felt that intervention should be open to the note holders until after the determination of the primary question. Until such time, it was not necessary for them to make their claims.

Interhandel has literally thousands of stockholders, the vast majority of whom reside in Switzerland and nearby countries. Presumably other neutral corporations whose assets have been or in the future will be vested will likewise have substantial numbers of shareholders. To permit the lower federal courts to establish the judicial policy of requiring all shareholders to enter suits under Section 9(a) prior to the time when basic preliminary questions will have been determined would be to impose an enormous and an unnecessary burden on our already congested federal trial courts. On the other hand, to permit traditional stockholders' suits to be brought by a small representative group which will be able to carry on litigation of the basic

preliminary questions will effectuate the purposes of the statute and, in addition, makes judicial good sense.

An additional important reason exists why petitioners' derivative theory should be accorded full recognition. In its answer to petitioners' complaint, respondent has pleaded the technical defense of the statute of limitations (31 U.S.C. 203), which if eventually allowed by the Court, might have the effect of destroying the rights of the non-enemy stockholders, since none of them prior to the opinion of this Court in *Kaufman* v. *Societe Internationale* (with the exception of the Kaufman family itself) had filed administrative claims or suits.[7]

It was well known to this Court when it decided *Kaufman* v. *Societe Internationale* that the time fixed by the letter of the statute for filing administrative claims and suits had expired. We therefore cannot assume that this Court when it construed the Trading With the Enemy Act as affording innocent stockholders of neutral corporations protection of their rights in the seized assets intended to give an empty right which could not be enforced because of a statutory prohibition. Such a construction of this Court's opinion would indicate that the Court was only giving lip service to the rights of non-enemy stockholders which were being judicially recognized for the first time. It would appear, however, that such an unwarranted construction of this Court's opinion was adopted by the Court of Appeals.

(d) Petitioners' stockholdings, when correctly computed, will be more than the 25% of the total capital

[7] 50 U.S.C. App. § 33, 60 Stat. 925, as amended.

of Interhandel which the Custodian will retain under the order of the District Court.

The proportionate interests of the intervening stockholders should be determined on the basis of the capitalization of Interhandel at the time the rights of the intervening stockholders are finally adjudicated, rather than at the time of vesting. The common stock capitalization of Interhandel has been reduced from 250,000 to 193,416 since the date of vesting (the preferred stock remaining the same), thereby materially increasing the proportionate interest of each common share in the assets.

Since the preferred stock is limited and preferred in liquidation to 110% of par, while the common is unlimited, the trial court improperly equated the preferred and common stock on the basis of their relative par values. (Finding No. 17, R. 273) Furthermore, the trial court found that the preferred stock's prior claim in liquidation can be fully satisfied from non-vested assets of Interhandel. (Finding No. 21, c. 274) Therefore, the entire equity in the vested assets should be treated as being in the common stockholders.

The 81,400 shares of Interhandel which its subsidiary, GAF, distributed to the respondent as dividends on the Interhandel claimed stock subsequent to the time of vesting should have been disregarded by the trial court, as well recognized principles of accounting direct,[8] or added proportionately to the intervenors' shares for the purpose of determining the intervenors' proportionate interest in Interhandel. This is so because the intervenors, if successful, will be entitled

[8] See *Paton's Accountants' Handbook*, (3rd Edition, 1947) at page 1099.

not only to their proportionate interest in the vested assets but also to their proportionate interest in any increment on the vested assets.

If the foregoing errors are corrected, it will be seen that the interest of the intervenors in the seized assets is not 15.439%, as the trial court found, but 37.2%. The latter percentage is the ratio which the intervenors' 41,683 shares bear to the outstanding common shares (193,416) reduced by the dividend shares (81,400), or the ratio of 41,683/112,016. The same result is reached if the intervenors' 37.2% interest in the 81,400 dividend shares, or 30,290 shares, is added to their 41,683 shares (making 71,973 shares) and that total is divided by the outstanding 193,416 common shares. Even if the court should reject intervenors' contention respecting the preferred stock (second error above), the denominator becomes 213,416 and the percentage is still over 25%—namely, 33.7%.

The only proper solution for the determination of the non-enemy interest in Interhandel would be to treat the non-allocated shares as enemy or non-enemy owned in the same ratio as the remaining stock of the parent is owned (or, what amounts to the same thing, eliminate from the base of the equation such part of the total block as is attributable to the shares vested by the Custodian, namely 81,400 shares). Thus, even if the court rejects petitioners' contention respecting the preferred stock, the ratio becomes 41,683/132,016, or 31.5%.

In either case, whether by allocation among the enemy and non-enemy interest or by the elimination principle, the entire interest held by the Custodian will be properly attributed to the enemy and non-enemy interest.

We, therefore, respectfully submit that, on a correct computation, the interest of the intervening stockholders in the seized assets is in excess of 25%. This having been demonstrated, it necessarily follows that the Courts below erred in holding that petitioners were not entitled to the requested injunction.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: July 19, 1957.

APPENDIX A

Trading With the Enemy Act, 50 U.S.C. App. § 9

§ 9. *Claims to property transferred to custodian; notice of claim; filing; return of property; suits to recover.*

(a) Any person not an enemy or ally of enemy claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, or to whom any debt may be owing from an enemy or ally of enemy whose property or any part thereof shall have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States may file with the said custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; and the President, if application is made therefor by the claimant, may order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States, or of the interest therein to which the President shall determine said claimant is entitled: *Provided*, That no such order by the President shall bar any person from the prosecution of any suit at law or in equity against the claimant to establish any right, title, or interest which he may have in such money or other property. If the President shall not so order within sixty days after the filing of such application or if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may institute a suit in equity in the Supreme Court of the District of Columbia or in the district court of the United States for the district in which such claimant resides, or, if a corporation, where it has its principal place of business (to which suit the Alien Property Custodian or

the Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title, or debt so claimed, and if so established the court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or the interest therein to which the court shall determine said claimant is entitled. If suit shall be so instituted, then such money or property shall be retained in the custody of the Alien Property Custodian, or in the Treasury of the United States, as provided in this Act [sections 1-6 and 7-39 of this Appendix] and until any final judgment or decree which shall be entered in favor of the claimant shall be fully satisfied by payment or conveyance, transfer, assignment, or delivery by the defendant, or by the Alien Property Custodian, or Treasurer of the United States on order of the court, or until final judgment or decree shall be entered against the claimant or suit otherwise terminated.

(Oct. 6, 1917, c. 106, § 9, 40 Stat. 419; July 11, 1919, c. 6, § 1, 41 Stat. 35; June 5, 1920, c. 241, 41 Stat. 977; Feb. 27, 1921, c. 76, 41 Stat. 1147; Dec. 21, 1921, c. 13, 42 Stat. 351; Dec. 27, 1922, c. 13, 42 Stat. 1065; Mar. 4, 1923, c. 285, § 1, 42 Stat. 1511; May 7, 1926, c. 252, 44 Stat. 406; Mar. 10, 1928, c. 167, §§ 11-14, 20, 45 Stat. 270-273; Aug. 24, 1937, c. 745, 50 Stat. 748.)

APPENDIX B

Oral Ruling of the District Court (Pine, J.) on Motion for Injunction

"THE COURT: (Pine, J.) Well, gentlemen, it appears from the papers before me that the Attorney General proposes to invite bids for the purchase from him of approximately 427,000 shares of Common A stock and 1,540,000 shares of Common B stock of G.A.F. and, if satisfactory bids are received, to sell the stock.

The Attorney General is the record holder of approximately 91 percent of the outstanding Common A shares and 100 percent of the outstanding Common B shares. The bids will be opened April 23, 1957. That is little more than a month from today. Injunctions have been sought by the plaintiff Interhandel and by certain plaintiff intervenors, generally referred to as the Kaufman group and the Attenhofer group, to enjoin the defendant from proceeding with the proposed sale. I have no doubt that, either way I decide, an appeal will be taken to the Court of Appeals and an effort will be made to take the matter to the Supreme Court.

This view is based upon past experience with this protracted and extensively litigated lawsuit. It is therefore necessary, in the interest of justice, that I act as promptly as possible in order that these appeals may be taken, heard, and disposed of, if possible, prior to the date of the opening of the bids. The motions and briefs were submitted to me as they were filed and I have had an opportunity to read and consider them prior to this hearing and I have had the advantage of the extensive oral arguments and I am ready to rule. I read the briefs in advance in order that I might be able to act promptly and rule promptly.

The plaintiff intervenors' rights are limited by the Kaufman decision to an interest in the assets proportionate to their stockholdings. It appears that they represent only approximately 15 percent of the stockholdings of Interhandel. Under the bar date order, no stockholders other than those who intervene are permitted to receive any benefit from any judgment. Defendant plans to sell only 75 percent of the Interhandel vested stock of G.A.F. whereas the maximum recovery by the intervenors cannot exceed 15 percent of this Interhandel claimed G.A.F. stock. Defendant is therefore proposing to sell stock, an interest in which under no circumstances could be claimed by the plaintiff intervenors, and I reach this conclusion as to his right to sell on either the individual theory or the derivative theory.

I cannot subscribe to the theory of the intervening plaintiffs that they are entitled to a fractional interest in all the stock, or to the basis of their claim for all the vested property less only so much as is proportionate to the enemy stock interest. That theory might give the plainiff intervenors something to which they are not entitled, namely, an interest in the nonenemy stock which, for some reason, has not been claimed. While the proportionate amount ultimately to be returned to the intervening plaintiffs has not been determined and will not be determined until each claim has been finally decided, the maximum amount that can be recovered has been determined by the claims filed before the bar date and that is amply secured by the retention by defendants of the 25 percent not offered for sale.

When I spoke of maintaining the status quo in my opinion in relation to the injunction to forbid the reclassification of the stock, of course, as that opinion will show, it related to the status quo or integrity of each and every share of stock including those in which the plaintiff intervenors claimed an interest. In my opinion, that interest would have been injured by the total reclassification. No such situation exists here as the proposed sale is only to sell that stock in which intervening petitioners have no interest.

Now, so far as the motion for an injunction by Interhandel is concerned, I am of the opinion that it is not entitled to an injunction from this Court because final judgment has been entered herein and plaintiff lacks standing; and, also, this Court has no jurisdiction to issue it.

In the injunction proceeding last fall for reclassification of the stock, it was not necessary to decide this point because the full relief sought was given at the instance of the plaintiff intervenors. Here it becomes necessary to decide the point because the plaintiff intervenors, as I have stated, are not entitled to the relief sought and I decide that Interhandel is not entitled to an injunction from this Court on the present record.

The pendency of a counter claim has no application to rights given under Section 9(a). Counsel will submit, with all due speed, findings and conclusions in accordance herewith."

Oral Ruling of the District Court (Pine, J.) on Motion for Rehearing

"THE COURT: I am of the view that the critical date, the basic date, the date, when the interest of these intervenors was fixed and their rights were fixed, was at the time of vesting in 1942.

I am also of the opinion that the preferred stock should be considered and counted.

I approve of the method of reducing it to 20 per cent.

I do not see any basis for considering that the stock of Chemie in the portfolio of G.A.F. is treasury stock of Chemie.

I am of the opinion that if the intervenors are entitled to the increment on the vested property it can not relate back to increase their proportions. But apparently, even if it does, from the way the figures have been presented to me, the percentage of interest in Chemie of the intervenors is below 25 per cent."

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13822

ERIC G. KAUFMAN, et al., APPELLANTS,

v.

HERBERT BROWNELL, JR., Attorney General of the United States, et al., APPELLEES.

No. 13823

ERNEST ATTENHOFER, et al., APPELLANTS,

v.

HERBERT BROWNELL, JR., Attorney General of the United States, et al., APPELLEES.

Appeals from the United States District Court for the District of Columbia

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Decided June 20, 1957

Mr. Robert E. Sher, with whom *Messrs, Isadore G. Alk* and *James H. Heller* were on the brief, for appellants in No. 13822.

Mr. Edmund L. Jones, with whom *Mr. C. Frank Reifsnyder* was on the brief, for appellants in No. 13823.

Mr. David Schwartz, Attorney, Department of Justice, with whom *Messrs, George B. Searls, Paul E. McGraw, Sidney B. Jacoby* and *Ernest S. Carsten*, Attorneys, Department of Justice, were on the brief, for appellees.

Before WILBUR K. MILLER, FAHY and DANAHER, *Circuit Judges.*

DANAHER, *Circuit Judge:* These are consolidated appeals lodged by two groups of intervenors in the corporate action commenced in 1948 by Societe Internationale, a Swiss corporation, formerly called I. G. Chemie, but now commonly known as Interhandel. Commencing in February 1942, the Attorney General or his predecessors issued a series of vesting orders by which, under the Trading with the Enemy Act,[1] the Government had seized some 93% of the stock of General Aniline & Film Corporation (hereinafter called GAF), said to have been the property of foreign nationals or owned by or held for I. G. Farbenindustrie A.G. of Germany. Background facts in substantial measure may be gleaned from our opinion in *Societe Internationale, Etc.* v. *Brownell.*[2] In the latter action, the Kaufman group was permitted to intervene,[3] after which the Attenhofer group was also allowed[4] intervention over the opposition of the Kaufman group. In all, some 2,488 stockholders intervened; the complaints of 720 were dismissed; and the remaining 1,768 stockholders own a total of 41,683 shares, found by the District Court to represent 15.439% of the total outstanding stock of I. G. Chemie at the date of vesting. When the Attorney General announced on February 21, 1957, a proposed public sale of 75% of the shares of the vested GAF stock, appellants sought to enjoin the sale of any of the vested shares. Judge Pine denied motions for an injunction,

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[1] 40 STAT. 411, as amended, 50 U.S.C. App. §§ 1-40 (1952).

[2] 96 U.S. App. D.C. 232, 225 F. 2d 532 (D.C. Cir. 1955), *cert. denied*, 350 U.S. 937 (1956); and see Societe Internationale, Etc. v. Brownell, Nos. 13460 and 13527 (D.C. Cir. Apr. 11, 1957).

[3] Kaufman v. Societe Internationale, 343 U.S. 156 (1952).

[4] Following the District Court's order, motion for leave to file petition for a writ of mandamus was denied, Kaufman v. Pine, 344 U.S. 891 (1952).

and after appellants had moved jointly for rehearing, the District Court on March 15, 1957, made findings of fact and conclusions of law with respect to both motions for injunction and joint motion for rehearing. The same day two orders were entered denying all motions and these appeals followed.

Appellants in the Kaufman group claim, in effect, that theirs is a corporate derivative action which entitles them ultimately to the return of "the innocent proportion" of the vested assets and that such portion may well exceed 80% of the vested property.

Appellants in the Attenhofer group claim that the District Judge misconstrued the decision of the Court in *Kaufman* v. *Societe Internationale*, erred in holding that the various appellants represent only themselves and not all non-enemy stockholders of Interhandel, and further, briefly, erred in holding that retention of 25% of the vested stock is sufficient in view of the respective claims.

Both groups insist that § 9(a) of the Trading with the Enemy Act[5] requires that *all* vested property here involved "shall be retained" by the Custodian once suit is brought and until final judgment. Without our particularizing as to further details of the grounds upon which reversal is sought, we turn to the *Kaufman* case which we deem controlling.

The Court pointed out, as it supplied the background upon which intervention was permitted, that petitioners "admitted the right of the Custodian to retain an interest in the seized assets proportional to the stock ownership of enemy stockholders."[6] Thus the question was, said Mr. Justice Black, "What *part* of the assets of a corporation organized under the laws of a neutral country may the Custodian retain where *part* of the corporate stock is

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[5] *Supra* note 1, 50 U.S.C. App. § 9(a).

[6] 343 U.S. at 158.

owned by enemies, *part* by American citizens, and *part* by nonenemy aliens?'"[7]

The answer, in paraphrase, ran to the effect that all corporate assets may be seized, whereupon consideration must be given to the plight of innocent stockholders whose innocent interests are not required to be confiscated. Accordingly,

> "Our holding is that when the Government seizes assets of a corporation organized under the laws of a neutral country, the rights of innocent stockholders to an interest in the assets proportionate to their stock holdings must be fully protected. This holding is not based on any technical concept of derivative rights appropriate to the law of corporations. It is based on the Act which enables one not an enemy as defined in § 2 to recover any interest, right or title which he has in the property vested. The innocent *stockholder* may not have title to corporate assets, but *he* does have an interest which Congress has indicated should not be confiscated merely because some others who have like interests are enemies."[8]

The Kaufman petitioners there had attacked the position of the corporation, Interhandel, which sought return of "all its assets" on the theory they would suffer if "whatever return is obtained must be divided among enemy and nonenemy shareholders in proportion to their stock holdings."[9]

The Government, agreeing with the position of the corporate management, argued that if nonenemy stockholders were to be given any standing, they should be limited to individual suits for money judgments against the Custodian. "Petitioners claim a proportional right or inter-

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[7] *Ibid.* (Emphasis supplied.)

[8] 343 U.S. at 159-60. (Emphasis supplied.)

[9] *Id.* at 160.

est in the specific assets of Interhandel . . . ."[10] Having so taken account of the respective arguments, and permitting maintenance of the corporate action, the Court then cut through the "corporate veil" and allowed—*in that corporate action*—the "nonenemy stockholder *in his own right* [to] . . . assert *his* nonenemy character in order to protect *his own interest* from the enemy taint caused by other stockholders."[11]

To us the Court is speaking clearly, succinctly and positively. To avoid multiplicity of actions by thousands of individual shareholders, a corporate action may be brought as one had been brought. In that action an individual stockholder might intervene, and on the basis of his own entitlement, his individual right might be asserted. If he could not prove his right, that ended the matter, but at least he might intervene to show his own nonenemy character. Thus, the petitioners, represented then by the Kaufman group, were allowed to intervene over the strong dissent which saw the majority permitting a friendly stockholder to withdraw his contribution to the funds of the corporation.[12]

We are no longer concerned with the problem of a corporate recovery, for the corporation's suit has been dismissed.[13] We thus conclude as did the Court, that each innocent nonenemy stockholder[14] permitted to intervene in the corporate suit, has a "severable interest in corporate assets seized by the Custodian . . . ."[15] When his right is established and the extent of that severable interest is

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[10] *Id.* at 161.

[11] *Ibid.* (Emphasis supplied.)

[12] 343 U.S. at 168.

[13] *Supra* note 2.

[14] Fritz von Opel v. Brownell, —— U.S. App. D.C. ——, —— F. 2d ——, No. 13265 (D.C. Cir. May 23, 1957).

[15] 343 U.S. at 161.

shown, the courts have "adequate equitable power and procedural flexibility to protect all interests,"[16] including that of the Government.

Section 9(a) of the Act provides that when the court in an equity action finds an individual claimant's interest has been established, it shall order the "payment, conveyance, transfer, assignment, or delivery . . . of the money or other property . . . or the interest therein to which the court shall determine said claimant is entitled;" not the property or interest therein of some *other* claimant, or even of all claimants similarly situated, but of that to which "*said claimant*" is entitled, as established in the suit he instituted. "[S]uch money or property" commanded to be retained pending final judgment or decree can only be that to which claim is made by the claimant authorized by § 9 to institute the action reflecting his own "severable" right.

It follows that the intervenors here were not entitled to enjoin the sale of assets aggregating in value some $100,000,000 pending ascertainment (1) of their right and (2) the extent of their respective interests following the establishment of their severable rights.

But, it is argued, the District Court in any event erred in finding that the interests of the intervening groups did not exceed 25% of the vested assets, indeed that it was error to find such interests amounted to only 15.439% of the total outstanding stock of I. G. Chemie at the date of vesting. We cannot say the District Court abused its discretion or otherwise erred in retaining 25% of the vested assets to answer to such claims and interests as shall be established.

Affirmed.

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[16] *Ibid.*

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Nos. 298, 299

In the Supreme Court of the United States

OCTOBER TERM, 1957

ERIC G. KAUFMAN, ET AL., PETITIONERS

v.

HERBERT BROWNELL, JR., ATTORNEY GENERAL OF THE UNITED STATES, ET AL.

ERNEST ATTENHOFER, ET AL., PETITIONERS

v.

HERBERT BROWNELL, JR., ATTORNEY GENERAL OF THE UNITED STATES

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 298

ERIC G. KAUFMAN, ET AL., PETITIONERS

v.

HERBERT BROWNELL, JR., ATTORNEY GENERAL OF THE UNITED STATES, ET AL.

No. 299

ERNEST ATTENHOFER, ET AL., PETITIONERS

v.

HERBERT BROWNELL, JR., ATTORNEY GENERAL OF THE UNITED STATES

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The rulings of the District Court of March 13 and 14, 1957 (R. 263–265, 269), have not been reported. The opinion of the Court of Appeals (R. 278–283) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered June 20, 1957. (R. 284.) The petitions for writs of certiorari were filed July 19, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Petitioners are minority stockholders in a Swiss holding company who were permitted by *Kaufman* v. *Societe Internationale,* 343 U. S. 156, to intervene in the corporation's suit for return of vested property to assert their rights "to an interest in the assets proportionate to their stock holdings." The trial court found that petitioners' proportionate share could not exceed 25% of the vested assets.

The question is whether the trial court abused its discretion in denying petitioners' motions for an injunction restraining the Attorney General from offering for sale 75% of the vested assets, the remaining 25% to be reserved to satisfy fully petitioners' claims.

STATUTES INVOLVED

The pertinent provisions of the Trading with the Enemy Act are set out in the Appendix, *infra,* pp. 17–20.

STATEMENT

These are petitions for writs of certiorari to review a judgment of the Court of Appeals affirming orders of the District Court denying petitioners' motions for an injunction to restrain the Attorney General, as successor to the Alien Property Custodian, from sellin-

certain stock in General Aniline & Film Corporation, a Delaware corporation (GAF).

In October 1948, Societe Internationale pour Participations Industrielles et Commerciales S. A., a Swiss corporation also known as I. G. Chemie or Interhandel, brought suit in the District Court for the District of Columbia to recover some 93% of the stock of GAF, vested under the Trading with the Enemy Act (40 Stat. 411, as amended, 50 U. S. C. App. Sec. 1, *et seq.*). Petitioners are two groups of stockholders holding 41,683 out of 250,000 common shares of I. G. Chemie who intervened pursuant to this Court's decision in *Kaufman* v. *Societe Internationale*, 343 U. S. 156.

Intervention was first sought in 1950 when Eric G. Kaufman, alleging himself to be a nonenemy stockholder in I. G. Chemie, filed a motion for leave to intervene in the corporate action on his own behalf and on behalf of all other nonenemy stockholders of plaintiff I. G. Chemie. (R. 2.) Kaufman based his plea for intervention on the charge that the enemy-dominated management of I. G. Chemie was about to settle its corporate claim with the Government for an amount less than the value of the nonenemy interests in the assets. Such a settlement, Kaufman alleged, would deprive nonenemy stockholders of part of their property. 343 U. S. at 160–161.[1] The District Court

[1] While Kaufman's proposed complaint prayed for return of a portion of the vested GAF stock, his counsel, in the course of the proceedings on the motion to intervene, proffered a written stipulation permitting respondents to sell the GAF stock at any time, the proceeds to take the place of the stock in litigation. (R. 184.)

denied the motion, 90 F. Supp. 1011, and the Court of Appeals affirmed. 188 F. 2d 1017. This Court reversed, holding that the intervention should be permitted to protect "the rights of innocent stockholders to an interest in the assets proportionate to their stock holdings." *Kaufman* v. *Societe Internationale, supra,* at 159–160.

On June 16, 1952, petitioner Ernest Attenhofer, acting for himself and a group of other Chemie stockholders,[2] moved to intervene independently of Kaufman, alleging that the right recognized by the decision in *Kaufman, supra,* was an individual right of each stockholder. (R. 27–32, 63–64, 85–93, 102–103.) Attenhofer's motion was granted over the objection of Kaufman. Kaufman's motion to this Court for leave to file a petition for a writ of mandamus against the District Judge to prevent the intervention was denied. *Kaufman* v. *Pine,* 344 U. S. 891.

In February 1953, the District Court ruled that I. G. Chemie's complaint would be dismissed unless, within a specified time, Chemie complied with a 1949 discovery order. *Societe Internationale, etc.* v. *McGranery,* 111 F. Supp. 435. In November 1953, the District Court found that Chemie had not complied and that the complaint therefore would be dismissed.

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[2] The Attenhofer group consists of minority stockholders in I. G. Chemie who are represented by a stockholders' committee organized by the corporation. Membership in the Attenhofer group is without any cost to the stockholders; the corporation bears all fees and costs of the litigation. (R. 30–31, 35, 67, 90–91, 125–126.)

The order of dismissal, entered on December 21, 1953, provided that it shall be inapplicable to the claims of the petitioners. *Société Internationale, etc.* v. *Brownell,* 15 F. R. D. 83. (R. 271–272.) The dismissal was affirmed by the Court of Appeals which, however, granted an additional six months' period of grace for compliance. 225 F. 2d 532. A petition for rehearing *en banc* was denied on September 1, 1955. Certiorari was denied. 350 U. S. 937.[3]

On July 21, 1953, the special master,[4] stating that he was acting "in the exercise of the 'equitable power and procedural flexibility' referred to in the said decision of the Supreme Court," entered a bar date order directing the individual stockholders of I. G. Chemie to intervene before January 1, 1954, or be barred from benefitting from any judgment in this action with respect to rights or interests of nonenemy stockholders. (R. 119–120.) The master found that "this case can be brought to a conclusion within a reasonable period of time and in an orderly fashion only if such allegedly nonenemy stockholders" intervene or be barred. (R. 119.) "Only by making the individual claimants parties can there be a complete disposition of the present controversy." (R. 114.)

On December 16, 1953, the District Court affirmed the master's bar date order. The stockholders were

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[3] On April 11, 1957, the Court of Appeals affirmed orders of the District Court denying I. G. Chemie's motions to further extend the time for production and to vacate the order entered upon the mandate of the Court of Appeals. 243 F. 2d. 254. Petition for rehearing *en banc* was denied May 10, 1957.

[4] By order of the District Court, the case had been referred to a special master in 1950.

given an additional three months to intervene, until March 31, 1954. (R. 123–124, 141–142.) Pursuant to the publication of the bar date order here and abroad, as decreed by the court, 2,488 stockholders did intervene. (R. 142, 206–208, 225.)[5]

On February 21, 1957, the Attorney General offered for sale 75% of the vested GAF stock, the remaining 25% to be reserved to satisfy the claims of the intervening stockholders. Petitioners' motions for an injunction restraining the sale were denied by the District Court for the reason that petitioners' "rights are limited by the *Kaufman* decision to an interest in the assets proportionate to their stock holdings." (R. 264.) Finding that the intervening stockholders owned only 15% of I. G. Chemie's capital stock (R. 273–274), the court ruled that their maximum recovery "cannot exceed 15 percent of this Interhandel claimed GAF stock." Because the Attorney General proposed to sell only 75% of the Chemie-claimed GAF stock, "an interest in which under no circumstances could be claimed by the plaintiff intervenors," the court held that the Attorney General's authority to sell could not be questioned. (R. 264.) On a motion for rehearing, petitioners argued for other meth-

[5] For several years prior to the bar date, Schoop, Reiff & Co., a Swiss banking firm, which serves as a protective committee for stockholders in the Kaufman group (petitioners in No. 298), had been soliciting stockholders for authorization to act in their behalf. (R. 33–35, 38–44, 124–126.) Since the *Kaufman* decision, the Attenhofer committee (petitioners in No. 299), which has access to the lists of Chemie's stockholders, has also been soliciting stockholders to join that committee. (R. 30–31, 124–126.)

ods of computation which would enhance the percentage value of their 41,683 shares from 15% to over 37% of the outstanding Chemie stock, but the court reaffirmed its finding that petitioners' interest in I. G. Chemie "is below 25 percent." (R. 269.)

On review in the Court of Appeals, the judgment of the District Court was unanimously affirmed. (R. 278–283.) Relying upon *Kaufman* v. *Societe Internationale, supra,* the Court of Appeals found that each nonenemy stockholder has a "severable interest in corporate assets seized by the Custodian * * *. (R. 282–283.) It concluded that, under Section 9 (a) of the Trading with the Enemy Act (Appendix, *infra,* p. 19), the nonenemy stockholder may recover, not the interest of some other person, but only the interest to which the stockholder himself is found to be entitled. The court therefore held that petitioners may recover only their own proportionate interest in the assets and are not entitled under Section 9 (a) to enjoin the sale of assets exceeding that proportion. Finally, the court ruled that there was no error or abuse of discretion in the finding that petitioners' interests did not exceed 25% of the vested assets and, indeed, that their interests amounted to only 15.439% of the total outstanding stock of I. G. Chemie. (R. 283.)

ARGUMENT

1. The decision below is fully in accord with *Kaufman* v. *Societe Internationale, supra.* There this Court stated: "Our holding is that when the Government seizes assets of a corporation organized under

the laws of a neutral country, the rights of innocent stockholders to an interest in the assets proportionate to their stock holdings must be fully protected." 343 U. S. 156, 159–160. The Attorney General is proposing to sell only 75% of the vested GAF stock.[6] Since he will retain 25% to satisfy all possible claims of petitioners, who own only 15.439% of the I. G. Chemie stock, the courts below correctly concluded that petitioners are not entitled to an injunction.

The gist of petitioners' argument is that the 25% retained by the Attorney General might prove insufficient to protect the interests of absent and unidentified stockholders—*i. e.*, stockholders who, despite notice, have failed to appear in the action. Thus, the Kaufman petitioners contend, because their complaint contained a derivative theory of recovery, that this Court adopted that theory when it approved the filing of the Kaufman complaint in *Kaufman* v. *Societe Internationale*. But, even assuming *arguendo* that a derivative theory had been approved, it certainly would not follow that the intervening stockholders are entitled to an injunction for the benefit of nonappearing stockholders.[7] The only rights petitioners

[6] Due to the final dismissal of plaintiff I. G. Chemie, the vested assets in excess of petitioners' interests are free from the injunctive provision of Section 9 (a) of the Trading with the Enemy Act and are subject rather to Section 5 (b) of the Act (Appendix, *infra*, p. 17), in which the Attorney General is given full power to administer, sell, and liquidate vested property.

[7] Indeed, the District Court specifically stated (R. 264): "Defendant is therefore proposing to sell stock, an interest in

can invoke are personal rights—not the rights of unidentified third parties. See, *e. g., Tyler* v. *Judges of Court of Registration,* 179 U. S. 405, 406–407. In any event, there is no basis for assuming that this Court adopted a derivative theory of recovery in *Kaufman* v. *Societe Internationale.* On the contrary, as the opinion makes abundantly clear, the Court disapproved that theory and decreed that the right of recovery is of an individual nature.

After stating its holding that innocent stockholders have an interest "proportionate to their stock holdings," the Court added (343 U. S. at 160):

> This holding is not based on any technical concept of derivative rights appropriate to the law of corporations. It is based on the Act which enables one not an enemy as defined in Sec. 2 to recover any interest, right or title which he has in the property vested.

In like vein, the Court later summarized its decision as "holding that Congress has recognized that nonenemy stockholders of nonenemy foreign corporations have a severable interest in corporate assets seized by the Custodian * * *" (p. 161). Any possible doubt as to the holding is dispelled by the following passage in the opinion (p. 161):

> Petitioners claim a proportional right or interest in the specific assets of Interhandel and that they may not be driven to accept their

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which under no circumstances could be claimed by the plaintiff intervenors, and I reach this conclusion as to his right to sell on either the individual theory or the derivative theory."

> share of whatever price the Government may happen to get from a sale of these valuable assets. In order to play safe, petitioners have filed a separate suit in a Federal District Court. But we think the questions involved in disputes like this can be more appropriately resolved in the corporate actions authorized by Sec. 9 (a) than by resort to a multiplicity of separate actions. *In such suits the nonenemy stockholder in his own right may assert his nonenemy character in order to protect his own interest from the enemy taint caused by other stockholders.* Courts trying such corporate actions have adequate equitable power and procedural flexibility to protect all interests, even when the corporate recovery is not for the benefit of all stockholders but only for those who are nonenemies. [Emphasis added.]

The italicized sentence (omitted by the Kaufman petitioners, p. 12, in quoting this passage) further emphasizes that the stockholder's interest is a personal one and that it must be invoked "in his own right."[8]

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[8] The petitioners rely on the Court's use of the phrases "corporate actions" and "corporate recovery" in the above-quoted passage (Kaufman Pet. 12; see also Attenhofer Pet. 8). But these phrases, when read in context as they must be, afford no basis for petitioners' argument that they are entitled to invoke the interests of absent stockholders. The phrase "corporate actions" was quite plainly used only for the purpose of identifying suits (like this one) brought by corporations (*e. g.*, Chemie) to recover their assets; this Court held that nonenemy stockholders of such corporations could intervene in such "corporate actions." Similarly, the phrase "corporate recovery" was used to refer to the amount awarded in such suits, even though the recovery is "not for the benefit of all stockholders but only for those who are nonenemies."

Moreover, under the very terms of the Trading with the Enemy Act, the rights of recovery of petitioners cannot be measured by the interests of absent persons. The nonenemy stockholder of a neutral corporation can have a recovery ~~but he~~ must be "not an enemy" and pursuant to Section 9 (a) he can recover only "the interest * * * to which * * * said claimant is entitled." The necessary proof of nonenemy status is so personal as to require the conclusion that, no matter in whose suit or on whose behalf the right is asserted, the right is a personal one. There cannot be any recovery for other persons. As the Court of Appeals stated, when a claimant's interest has been established, the court under Section 9 (a) shall order the payment of the property or interest therein to which the claimant is entitled, "not the property or interest therein of some *other* claimant, or even of all claimants similarly situated, but of that to which *'said claimant'* is entitled." (R. 283.)[9]

[9] Petitioners' description (Kaufman Pet. 5, 12) of the rulings on respondents' motion under the Anti-Assignment Act (31 U. S. C. 203) to dismiss the complaints of intervening stockholders who purchased their Chemie shares after vesting is inaccurate. The special master denied the motion on the ground, *inter alia*, that there had been no assignment of the derivative corporate claim. (R. 149.) The Kaufman petitioners fail to state that, in confirming the order of the special master, the District Court emphasized that it did not thereby adopt the master's opinion or reasoning *in toto*. (R. 161.) Moreover, the issue of the Anti-Assignment Act is not now in question. What is involved here is whether there can be any recovery for the benefit of absent stockholders; and on that issue the master, like the District Court, ruled that stockholders who failed to intervene should be barred from recovery in the action. (R. 120, 123.)

2. Even assuming *arguendo* that petitioners could invoke the rights of absent stockholders prior to the bar date, they cannot do so after that date.

The special master found that the case could be brought to a conclusion "within a reasonable period of time and in an orderly fashion" only if there would be interventions "within a prescribed period of time." Without the bar date order, "confusion and disorder" would ensue in the litigation of the case. (R. 119, 123.) Sitting as a court of equity under Section 9 (a) of the Trading with the Enemy Act, the District Court could validly issue such an order in the interest of the orderly administration of justice.

Although not questioning the court's power in this regard or the sufficiency of the notice to the stockholders, petitioners attack the order as "so premature as to border on the fantastic" and as "grossly untimely and premature as a matter of law." (Attenhofer Pet. 11, 13.)[10] But when the order was first made by the special master in July 1953, the proceedings for dismissal of I. G. Chemie's complaint had been pending for years. See 225 F. 2d 532, 533–534. And the order was affirmed one month after the court had

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[10] The Kaufman petitioners (Pet. 14, n. 4) contend that the order is inconsistent with the alleged corporate nature of petitioners' suit. See *supra*, pp. 7–11. But even in such suits stockholders have been barred for reasons such as failure to join, laches, etc. *Bailey* v. *Jacobs*, 325 Pa. 187, 189 Atl. 320; *Matthews* v. *Headley Chocolate Co.*, 130 Md. 523, 100 Atl. 645; *Young* v. *Columbia Oil Co.*, 110 W. Va. 364, 158 S. E. 678. See also *Perlman* v. *Feldmann*, 219 F. 2d 173 (C. A. 2), certiorari denied, 349 U. S. 952; and other cases collected in Note, *Individual Pro Rata Recovery in Stockholders' Derivative Suits*, 69 Harv. L. Rev. 1314.

ruled finally that the complaint would be dismissed. See *supra*, pp. 4–5. Without the bar date order, years of complete inactivity on the claims of the intervening stockholders would necessarily have followed the dismissal of the complaint. Pretrial discovery would have been impossible. Petitioners Kaufman and Attenhofer had refused to divulge even the names of their fellow allegedly nonenemy stockholders. (R. 99.) On the other hand, after the bar date, it became possible, by means of interrogatories, to develop the essential facts concerning the personal status of the intervening stockholders and their title to the Chemie shares. (R. 225–226.)

As noted, no claim is, or can be, made that the bar date order did not allow sufficient time or that the stockholders were not given adequate notice. Respondents published the order in Swiss and domestic newspapers, as directed by the court (R. 115, 120–121, 124, 142); both petitioner groups advertised for adherents; and the Attenhofer group circularized all present stockholders on the postwar stockholders' list of I. G. Chemie, offering them representation without cost. (R. 30–31, 33, 35, 38–44, 90–91, 125–126.) As a result, whereas Kaufman and Attenhofer originally had sued for 744 stockholders, a total of 2,488 intervened before the bar date. (R. 225.) Not a single stockholder moved to challenge the order during the three years' period from the bar date (March 31, 1954) to the date

the District Court denied petitioners' motions for an injunction (March 15, 1957).[11]

Contrary to the assertion by the Attenhofer petitioners (Pet. 15), requiring stockholders of neutral corporations to intervene individually in corporate actions will not "impose an enormous and an unnecessary burden on our already congested federal trial courts." Intervention of the 2,488 stockholders was accomplished in the instant case without any burden on the trial court simply by the expedient of one single complaint for each of the intervening groups. Moreover, the issue here presented is not of general application. Not a single action of any corporation is pending in the courts where any group of stockholders has claimed, or can be expected to claim, rights under the *Kaufman* decision.

3. As already pointed out (*supra*, p. 7), in holding that the Attorney General's retention of 25% of the Chemie stock amply safeguarded petitioners' maximum interest, the courts below found that petitioners' shares represent only 15.439% of the Chemie capitalization. The Attenhofer petitioners (Pet. 16–

[11] Not until the eve of the oral argument before the Court of Appeals (on May 20, 1957) was the first attempt made to challenge the bar date, the Attenhofer petitioners then filing a motion for leave to intervene on behalf of five stockholders owning 450 shares. Only two additional shareholders claiming 340 shares have since filed motions. These facts refute the bland assertion of the Kaufman petitioners that the innocent holders of thousands of shares were deprived of rights and that the "innocent holders of the balance of the approximately 112,000 common shares outstanding in the hands of a scattered public are left without protection." (Pet. 14.) And see *infra*, p. 16.

18) urge that the 41,683 I. G. Chemie shares claimed by the petitioners represent more than 25% of the Chemie capitalization, perhaps 31.5% or 33.7%. They argue that the proportionate interest of the intervenor-stockholders in the vested assets should be determined, not on the basis of Chemie's capitalization at the time of vesting, but on the basis of whatever the capitalization might be on the date of final adjudication of the litigation.

It is settled, however, that under Section 9 (a) of the Trading with the Enemy Act there can only be a return to the nonenemy of the interest, right, or title which he has in the property at the time of vesting. *Von Zedtwitz* v. *Sutherland,* 26 F. 2d 525 (C. A. D. C.); *Koehler* v. *Clark,* 170 F. 2d 779 (C. A. 9); *Kaname Fujino* v. *Clark.* 71 F. Supp. 1 (D. Haw.), aff'd 172 F. 2d 384 (C. A. 9), certiorari denied, 337 U. S. 937, rehearing denied, 338 U. S. 839; *Sturchler* v. *Sutherland,* 19 F. 2d 999 (E. D. N. Y.). The cause of action of the innocent stockholders of I. G. Chemie arose at the time of vesting and the stockholders' percentage at that time is the percentage which governs.[12]

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[12] And, contrary to the assertions by the Attenhofer petitioners that the preferred shares should be disregarded, the District Court properly assigned a value to the outstanding preferred shares of I. G. Chemie, predicating the value on the par value of the preferred stock. (R. 273-274.) No substantial arguments have been advanced by the petitioners against that evaluation. Both courts below have agreed on the computation of petitioners' interests, and we believe that there is no reason for departing from the ordinary two-court rule. See *Comstock* v. *Group of Institutional Investors,* 335 U. S. 211, 214; *United States* v. *State Investment Co.,* 264 U. S. 206, 211; *Cornell University* v. *Fiske,* 136 U. S. 152, 176.

4. In any event, the absent stockholders—contrary to petitioners' suggestion—are not without a remedy. As the District Court (R. 261) pointed out, if for some sound reason an absent stockholder should appear and successfully challenge the bar date, his remedy will be against the proceeds of the sale of the assets.[13] The availability of this remedy further confirms the appropriateness of the District Court's exercise of equitable discretion in denying injunctive relief.

CONCLUSION

Since petitioners' stock interest is fully protected, they should not be permitted to block the proposed sale. The decision below upholding the denial of injunctive relief is clearly correct; there is no conflict of decisions; and no other reason appears which would warrant further review. Accordingly it is respectfully submitted that the petitions for writs of certiorari should be denied.

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[13] The constitutionality of this remedy has been upheld. *Becker Co.* v. *Cummings*, 296 U. S. 74, 79; *Ecker* v. *Atlantic Refining Co.*, 222 F. 2d 618, 622 (C. A. 4, 1955), certiorari denied, 350 U. S. 847; see *Central Union Trust Co.* v. *Garvan*, 254 U. S. 554; *Stoehr* v. *Wallace*, 255 U. S. 239.

APPENDIX

THE TRADING WITH THE ENEMY ACT, 40 STAT. 411, AS AMENDED, 50 U. S. C. APP. SEC. 1, *et seq.*

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SECTION 5

SUSPENSION OF PROVISIONS RELATING TO ALLY OF ENEMY; REGULATION OF TRANSACTION IN FOREIGN EXCHANGE OF GOLD OR SILVER

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(b) (1) During the time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, and under such rules and regulations as he may prescribe, by means of instructions, licenses, or otherwise—

(A) investigate, regulate, or prohibit, any transactions in foreign exchange, transfers of credit or payments between, by, through, or to any banking institution, and the importing, exporting, hoarding, melting, or earmarking of gold or silver coin or bullion, currency or securities, and

(B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest,

by any person, or with respect to any property, subject to the jurisdiction of the United States; and any property or interest of any foreign country or national thereof shall vest, when, as, and upon the terms, directed by the President, in such agency or person as may be designated from time to time by the President, and upon such terms and conditions as the President may prescribe such interest or property shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States, and such designated agency or person may perform any and all acts incident to the accomplishment or furtherance of these purposes; and the President shall, in the manner hereinabove provided, require any person to keep a full record of, and to furnish under oath, in the form of reports or otherwise, complete information relative to any act or transaction referred to in this subdivision either before, during, or after the completion thereof, or relative to any interest in foreign property, or relative to any property in which any foreign country or any national thereof has or has had any interest, or as may be otherwise necessary to enforce the provisions of this subdivision, and in any case in which a report could be required, the President may, in the manner hereinabove provided, require the production, or if necessary to the national security or defense, the seizure, of any books of account, records, contracts, letters, memoranda, or other papers, in the custody or control of such person; and the President may, in the manner hereinabove provided, take other and further measures not inconsistent herewith for the enforcement of this subdivision.

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SECTION 9

CLAIMS TO PROPERTY TRANSFERRED TO CUSTODIAN; NOTICE OF CLAIM; FILING; RETURN OF PROPERTY; SUITS TO RECOVER

(a) Any person not an enemy or ally of enemy claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, or to whom any debt may be owing from an enemy or ally of enemy whose property or any part thereof shall have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States may file with the said custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; and the President, if application is made therefor by the claimant, may order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States, or of the interest therein to which the President shall determine said claimant is entitled: *Provided*, That no such order by the President shall bar any person from the prosecution of any suit at law or in equity against the claimant to establish any right, title, or interest which he may have in such money or other property. If the President shall not so order within sixty days after the filing of such application or if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may institute

a suit in equity in the United States District Court for the District of Columbia or in the district court of the United States for the district in which such claimant resides, or, if a corporation, where it has its principal place of business (to which suit the Alien Property Custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title, or debt so claimed, and if so established the court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or the interest therein to which the court shall determine said claimant is entitled. If suit shall be so instituted, then such money or property shall be retained in the custody of the Alien Property Custodian, or in the Treasury of the United States, as provided in this Act [sections 1–6 and 7–39 of this Appendix] and until any final judgment or decree which shall be entered in favor of the claimant shall be fully satisfied by payment or conveyance, transfer, assignment, or delivery by the defendant, or by the Alien Property Custodian, or Treasurer of the United States on order of the court, or until final judgment or decree shall be entered against the claimant or suit otherwise terminated.

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